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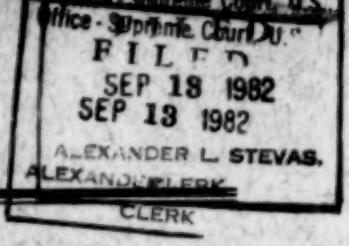

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BEHRING INTERNATIONAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to employees' protected union activity is shown, by a preponderance of the evidence, to be a motivating factor in its decision to lay off those employees, and the employer cannot establish by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employees' union activities.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	9
Appendix A	1a
Appendix B	17a
Appendix C	22a

TABLE OF AUTHORITIES

Cases:

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 ..... 6, 7

NLRB v. *Transportation Management Corp.*, petition for cert. pending, No. 81-168 (filed July 30, 1982) 7, 8, 9

Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, No. 81-987 (Mar. 1, 1982) 6, 7, 8

Statute and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 7, 29 U.S.C. 157 2

Section 8(a), 29 U.S.C. 158(a) 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 5

Section 8(a)(3), 29 U.S.C. 158(a)(3) 2, 5, 6

Section 10(c), 29 U.S.C. 160(c) 2-3

29 C.F.R. 102.69 4

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v.

BEHRING INTERNATIONAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–16a) is reported at 675 F.2d 83. The decision and order of the National Labor Relations Board (App. C, *infra*, 22a–27a) and the decision of the administrative law judge (App. C, *infra*, 28a–68a) are reported at 252 N.L.R.B. 354.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 17a–21a) was entered on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in part:

> * * *If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or

the payment to him of any back pay, if such individual was suspended or discharged for cause * * *

STATEMENT

1. Respondent, which sold equipment to the Iranian air force, operated a warehouse in Edison, New Jersey, at which it stored merchandise before shipping it to Iran (App. C, *infra*, 23a–24a n.4, 29a–30a). In February 1977, warehouse employee Eric Stromberg contacted the union, which began an organizational campaign among the warehouse employees. After several employees signed authorization cards, the union filed with the National Labor Relations Board, on March 22, a petition seeking a representation election (*id.* at 30a–31a).

During the following week, respondent reclassified three warehouse employees into higher-paying positions (App. C, *infra*, at 41a–42a). The Board found that this step was taken as a response to the union's organizing efforts (*id.* at 24a–25a, 57a–58a). At approximately the same time, respondent ordered freight shipments to the Edison warehouse diverted to a nearby warehouse operated by another firm, Summit Associates, Inc. The rates Summit charged for the use of its employees were substantially higher than those paid by respondent to its own employees (*id.* at 38a–40a). The manager in charge of respondent's Edison warehouse stated in front of another supervisor that respondent "wanted the men to see an empty warehouse and to let them think a bit on the union matter" (*id.* at 39a; see *id.* at 31a, 56a–57a).

On March 31, employees Lesniakowski and Jaconski called a meeting of warehouse employees at which they reported that the warehouse manager had said he would either subcontract the warehouse's work or close the warehouse if the employees voted for the union

(App. C, *infra*, 31a). The administrative law judge found, and the Board agreed, that this meeting was conducted "with the direction, assistance, and encouragement of management" (*id.* at 54a, 24a–25a). At the instance of Lesniakowski and Jaconski, the employees signed a petition opposing the union (*id.* at 35a–36a). Before the election on April 25, respondent's vice president held a meeting of the employees at which he announced that "if the employees did not organize things looked good" for the warehouse (*id.* at 45a); the warehouse manager held a meeting at which he warned that the employees might lose certain benefits if they voted for the union (*id.* at 46a); and another supervisor interrogated employees about their support for the union and about who the union's principal supporters were (*id.* at 47a–49a). Respondent also promised the warehouse employees a wage increase after the union election (*id.* at 43a, 58a), and granted recognition to an employee grievance committee (*id.* at 50a n.32, 59, 61a).

The union lost the representation election. Under Board regulations, an objection to an election must be filed within five days. 29 C.F.R. 102.69. Two days after the election, respondent granted the wage increase it had earlier promised to the warehouse employees (App. C, *infra*, 42a, 58a). Approximately two weeks later, the warehouse manager announced to other supervisors that respondent intended to subcontract the warehouse work and lay off the warehouse employees; in connection with this announcement, the manager explained that respondent "did not want the threat of the Union hanging over its head because in all probability the employees would go union in another year * * * when a new election could be held" and that respondent "would probably close the Edison terminal if the men did go union" (*id.* at 50a).

Shortly thereafter, three employees were laid off. They included Ray Stromberg, who was the brother of the employee who initially contacted the union and

whose name was mentioned in the course of the company supervisor's interrogation as one of those active in the organizing campaign (App. C, *infra*, 48a–49a, 52a). According to respondent, however, these layoffs were part of a reduction in force and were unrelated to the subcontracting decision (*id.* at 52a). Approximately one month later, five more employees were laid off in favor of the subcontractor *(ibid.)*. Lesniakowski and Jaconski—the employees who conducted the anti-union meeting at respondent's behest—were retained and assigned to train the subcontractor's employees *(ibid.)*. A company supervisor subsequently told Eric Stromberg (the employee who initially contacted the union) that the layoffs were his fault (*id.* at 48a–49a, 60a).

The administrative law judge found that respondent had violated Section 8(a)(3) and therefore Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), 158(a)(1), by laying off the eight employees and subcontracting out their work (App. C, *infra*, 63a, 64a).[1] He was "prepared to accept [respondent's] position that subcontracting the warehouse labor ultimately could be financially beneficial" (*id.* at 62a), but he concluded, on the basis of the timing of the decisions, the remarks made by respondent's supervisors, and respondent's sustained anti-union campaign, that the decision was motivated by anti-union bias in violation of Sections 8(a)(3) and 8(a)(1) (App. C, *infra*, 63a).

2. The Board sustained this finding. It recounted the evidence suggesting that the layoffs and subcontracting

[1] The administrative law judge also found (App. C, *infra*, 64a) and the Board agreed (*id.* at 22a–23a) that respondent violated Section 8(a)(1) by threatening and coercively interrogating its employees, soliciting them to sign the anti-union petition, granting and promising benefits, and diverting freight from the warehouse to dampen employee union sentiments. The court of appeals sustained these rulings (App. A, *infra*, 4a), and this petition raises no question concerning them.

were prompted by an improper purpose (App. C, *infra*, 24a–25a). The Board stated (*id.* at 25a; footnote omitted):

> [A]lthough [respondent] has proffered an economic defense, we find that [respondent] has failed to substantiate that defense with probative evidence that it would have subcontracted out its operations at the time it did had it not feared the resumption of organizational activity. For this reason, we find that [r]espondent has failed to rebut the General Counsel's *prima facie* case and, like the Administrative Law Judge, we therefore conclude that [respondent] unlawfully laid off its warehouse employees and subcontracted its warehouse work.

In reaching this conclusion, the Board relied (*id.* at 25a n.6) on its decision in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81–987 (Mar. 1, 1982). There the Board explained that in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled—explicitly following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—that the employer could avoid an unfair labor practice finding only if it proved, by a preponderance of the evidence, that the adverse action would have been taken even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

3. The court of appeals, stating that it disagreed with an aspect of the *Wright Line* test, declined to enforce the portions of the Board's order dealing with the layoffs and subcontracting. The court of appeals generally endorsed the *Wright Line* approach (App. A, *infra*, 8a). But it ruled that if the General Counsel had

shown by a preponderance of the evidence that an impermissible motive underlay respondent's decisions about the layoffs and subcontracting, respondent had only the burden of *producing evidence* that it would have taken the same action for legitimate, economic reasons (*id.* at 14a). The court of appeals rejected the *Wright Line* test insofar as it places on an employer, shown to have acted for an impermissible reason, the burden of persuasion—that is, the burden of proving by a preponderance of the evidence—that it would have taken the same action for legitimate reasons (App. A, *infra*, 14a; see *id.* at 9a). The court of appeals rejected the analogy to the *Mt. Healthy* test on the ground that *Mt. Healthy* involved constitutional, not statutory, issues (App. A, *infra*, 9a–10a).

In reaching these conclusions, the court of appeals explicitly agreed with the First Circuit's decisions rejecting the allocations of the burden of proof specified by the Board in *Wright Line* (App. A, *infra*, 11a). The court stated that respondent "did articulate a legitimate business reason for" its actions, and that "the General Counsel did not prove that the company's real motive was antiunion animus" (*id.* at 15a), although the court recognized that there was evidence supporting a finding that respondent had acted for an impermissible purpose (*id.* at 14a). The court concluded that "[t]his case must be remanded for reconsideration because the burden of proof was misallocated" (*ibid.*).

REASONS FOR GRANTING THE PETITION

In *NLRB* v. *Transportation Management Corp.*, petition for cert. pending, No. 82–168 (filed July 30, 1982), we have sought review of a First Circuit decision rejecting the burden-shifting aspect of the Board's

Wright Line test.[2] We urge that the First Circuit's decisions conflict with the decisions of several other courts of appeals, and that the Board's *Wright Line* test is fully consistent with the National Labor Relations Act.

Here, the court of appeals expressly relied on First Circuit decisions[3] and disagreed with the decisions of other circuits (App. A, *infra*, 13a–14a n.6) in concluding, like the First Circuit, that only the burden of production, not the burden of persuasion, could shift to respondent. Moreover, as its remand order makes clear, the court considered the allocation of the burdens of proof to be material to this case. This case therefore presents the same issue that we raise in our petition in *Transportation Management*.

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[2] A copy of our petition in *Transportation Management* has been sent to respondent.

[3] The First Circuit initially expressed its disapproval of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. 662 F.2d at 904–907. (Because the First Circuit believed that the shifting of the burden of proof was not material to the outcome of *Wright Line* itself, it enforced the Board's order in that case (*id.* at 907–909)). Both the court of appeals in this case (App. A, *infra*, 11a) and the First Circuit in *Transportation Management* (82–168 Pet. App. 3a) relied on the First Circuit's discussion in the *Wright Line* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the disposition of No. 82–168, *NLRB* v. *Transportation Management Corp.*

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1937

BEHRING INTERNATIONAL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 26, 1980

(NLRB No. 22-CA-7824)

Argued February 2, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*
(Opinion filed April 7, 1982)

OPINION OF THE COURT

WEIS, *Circuit Judge.*

One of the most persistent sources of labor litigation is the controversy that arises when an employee's discharge is based on dual motives—one being a legitimate business consideration and the other antiunion animus. In an effort to resolve the recurring controversy over its approach to this problem, the National Labor Relations Board adopted a rule which permits a finding of a violation if the employee would not have been discharged but for his union activity. *Wright Line, a Divi-*

sion of Wright Line, Inc., 251 N.L.R.B. 1083 (1980). As part of its rule, the Board shifts the burden of proof on this issue onto the employer after the General Counsel has established a *prima facie* case. We conclude that the Board's causation test is right, but that the procedural aspect is wrong because it runs afoul of statutory provisions on the burden of proof. Since the Board misallocated the burden in this case, we remand for further consideration.

On March 13, 1977, Teamsters Local No. 478 began an organizing campaign at a warehouse operated by Behring International in Edison, New Jersey. A majority of the warehouse employees voted against the union in the election held on April 25, and no objections were filed. About ten days after the election, however, three employees were laid off, followed by five more on June 3. Meanwhile, on May 26, Behring subcontracted for replacement labor with an outside firm.

On July 26, the union charged Behring with unfair labor practices and, after a hearing, an ALJ found against the company. The Board affirmed the findings of the ALJ, issued a cease and desist order and, in addition, directed reinstatement of the employees with back pay.

The ALJ found that the company violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), on several occasions before and shortly after the election.[1] In one instance, two employees, acting as agents for the company, convened a meeting of their fellow workers during business hours at the warehouse. The two employees told the workers

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. Section 7 of the Act, 29 U.S.C. § 157 (1976), provides in part: "Employees shall have the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activites for . . . other mutual aid or protection. . . ."

that they would be better off without a union, and said that the company would subcontract their work or close the plant if the union were voted in. They also solicited a document requesting that the union petition be withdrawn.

After the meeting, the company established a grievance committee, an action which the ALJ categorized as a pre-election benefit. The company had already reclassified three receiving clerks to higher-paid positions in the week after the election petition was filed, and later granted an across-the-board pay raise at a point when objections to the election would still have been timely.

Another § 8(a)(1) violation was found to have occurred when the company diverted freight to a facility owned by a different firm in order to emphasize that work was slow and jobs were in jeopardy. The company also intimated that the employees might lose their stock option and profit-sharing plans, as well as their pension benefits, if the union won the election. Finally, three days before the election, a supervisor interrogated an employee to discover the names of the persons who had started the union's organizing effort and to learn how each of the employees would vote.

The ALJ also found that the eight discharges and the decision to subcontract violated § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976).[2] Behring had argued that its actions were prompted by a severe decline in business at the warehouse, and the ALJ agreed that "subcontracting the warehouse labor ultimately could be financially beneficial." Nevertheless, he concluded that "although the Respondent eventually could have reduced

[2] Section 8(a)(3) makes it an unfair practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization".

its costs by laying off most of its own warehouse employees and by subcontracting their work . . ., the Respondent was motivated, at least in part, in so doing at that time by a desire to reduce the possibility of another union election in the future."

With one minor exception, the Board affirmed the findings of the ALJ and adopted his recommendations, determining that the company's economic defense to the § 8(a)(3) charges "failed to rebut the General Counsel's *prima facie* case" of unlawfully motivated discharges. To support this conclusion, the Board referred to its ruling in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980).

Behring raises three contentions on appeal. First, it claims that the § 8(a)(1) findings are not supported by substantial evidence and rest upon erroneous credibility determinations by the ALJ. Second, it asserts that it was denied a fair hearing because the ALJ revoked a subpoena *duces tecum* served on a Board agent who had investigated an earlier charge against the company. Third, it attacks the Board's *Wright Line* test for § 8(a)(3) violations as improperly shifting the burden of proof on the issue of the company's motive for discharging its employees and subcontracting its work.

We see no need to discuss the § 8(a)(1) violations at length. Behring strongly contests the finding of the ALJ and we might well have come to a different conclusion had we tried the case in the first instance. Our role, however, is limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of fact. 29 U.S.C. § 160(e) (1976). Similarly, credibility resolutions generally rest with the ALJ when he considers all the relevant factors in his explanation. *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978). Since we cannot say that substantial evidence is lacking here, we must reject the company's challenges to the § 8(a)(1) findings.

As for the subpoena, Behring surmised that the testimony and notes of the Board agent would reveal admissions impeaching the credibility of the General Counsel's witnesses. The agent had secured statements from employees in the course of investigating an earlier charge that had been withdrawn for cause. At the hearing, however, the ALJ revoked the subpoena after the company was given access to the statements obtained from the witnesses. The Board upheld the ALJ's action because the information sought by Behring fell within the "'limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB,' *Stephens Produce Co., Inc. v. NLRB*, 515 F.2d 1373, 1376 (8th Cir. 1975)," and the company had not shown a substantial reason to disregard the privilege.

Behring contends that the subpoena should not have been quashed because the material it sought from the agent is available under the Freedom of Information Act. *But see, New England Medical Center Hospital v. NLRB*, 548 F.2d 377 (1st Cir. 1976). We need not address the provisions of the FOIA however, for the company never made a request for disclosure. Since Behring was furnished with the witnesses' prior statements and no prejudice resulted, we do not believe that the Board erred in finding that a limited evidentiary privilege justified the ALJ's action.

Of far greater concern to us is the Board's treatment of the lay-offs. An employer accused of discharging workers in violation of §8(a)(3) may assert, as did Behring here, that it was motivated by legitimate business considerations rather than antiunion bias. When this occurs, the Supreme Court has said, "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" whether the statute has been violated. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961). It is essential that the Board ascertain the true reason for the employer's action in these "dual motive" cases, since "[t]he

Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them . . . and . . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation and coercion." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937).[3]

Despite this directive, for many years the Board took the position that a discharge violated § 8(a)(3) as long as it was motivated "in part" by antiunion animus. *See* cases collected in *Wright Line*, 251 N.L.R.B. at 1084. The Board's "in part" test received a mixed recepition among the courts of appeals. The First Circuit rejected it, saying that "[t]he mere existence of antiunion animus is not enough" to establish that a discharge violated § 8(a)(3) when a legitimate business reason for the employer's action also existed. *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968). Instead, the court required the Board to show that the employer's "dominant" or actual motive was hostility towards the employee's union activity. *See NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963) (Aldrich, J., concurring). The rationale was that an employee who engaged in organizational activity should not be

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[3] We recognize that there is a distinction between "pretext" and "dual motive" cases. In Lippincott Industries, Inc. v. NLRB, 661 F.2d 112, 114 (9th Cir. 1981), however, the court observed that "in terms of the proper legal standard to be applied, the difference between these two types of cases is of little importance." It explained: "In either instance, the employer has asserted justifiable, legitimate business reasons for the discharge. The difference is that in a pretext case the employer's reasons are discredited or otherwise rejected, leaving only the impermissible reason, while in a mixed motive case the relative causative force of the employer's reasons is compared against the impermissible reason to determine whether the latter is the moving cause behind the discharge." *Id.*

entitled to immunity if another worker similarly situated except for the union activism would be subject to discharge.

The Supreme Court confronted an analogous situation in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There, a school board did not rehire a teacher after his contract expired, in part because it was offended by his exercise of First Amendment rights and in part because of other reasons. The Court decided that it was necessary to formulate "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Id.* at 286. Since the "constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct," *id.* at 285–286, the employer was free to show that it would have reached the same decision even in the absence of the teacher's First Amendment activity.

In *Wright Line*, 251 N.L.R.B. at 1087, the Board recognized that the Supreme Court's causal analysis in *Mt. Healthy* "represent a rejection of an 'in part' test which stops with the establishment of a *prima facie* case or at consideration of an improper motive." Even though *Mt. Healthy* was not an National Labor Relations Act case, the Board decided to adopt the Supreme Court's approach because it saw "the advantage of clearing the air by abandoning the 'in part' language in expressing our conclusion as to whether the Act was violated." *Id.* at 1089. Henceforth, the Board announced, it would employ a new causation test in all cases turning on employer motivation:

> "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer

> to demonstrate that the same action would have taken place even in the absence of the protected conduct."

Id. at 1089.

The *Wright Line* test has both substantive and procedural components. Substantively, it analyzes the connection between an employee's discharge and an employer's antiunion animus in terms of "but for" causation. To find a § 8(a)(3) violation, the Board must determine that the employee would not have been discharged but for his protected union activity. No violation exists if the employer would have made the same decision to discharge the employee in any event, absent the shielded conduct.

The Board's adoption of the "but for" test is a welcome development which should reduce the confusion in this controversial area of labor law. The "but for" test satisfies this court's requirement that the Board seek the "real motive" or "real cause" for an employee's discharge. *See, NLRB v. General Warehouse Corp.*, 643 F.2d 965, 972 (3d Cir. 1981). In *Edgewood Nursing Center, Inc. v. N.L.R.B.*, 581 F.2d 363, 368 (3d Cir. 1978), we said:

> "[I]f the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. In that circumstance there is no causal connection of any anti-union bias and the loss of the job."

Or, as we put it in *Gould Incorporated v. NLRB*, 612 F.2d 728, 734 (3d Cir.), *cert. denied*, 449 U.S. 890 (1980), "if it is found that the employee would have been disciplined for proper cause notwithstanding the employer's attitude toward the union, the discipline must be held to be nondiscriminatory, because in that case the causal relationship between the anti-union bias

and the discipline would be insufficient to support a conclusion that the discipline was administered 'because of' the protected activity. . . ."

There are difficulties, however, with the procedural aspect of the *Wright Line* rule. As mentioned earlier, the Board first requires the General Counsel to make "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 N.L.R.B. at 1089. Once this is done, the burden shifts onto the employer to "demonstrate" that the same action would have taken place even in the absence of the protected conduct. *Id.* By "demonstrate," the Board means that the burden of persuasion shifts to the employer, not merely the burden of going forward with evidence to rebut the *prima facie* case. Consistent with this, the Board "views the employer's asserted justification as an affirmative defense." *Id.* at 1084 n.5, 1088 n. 11.

The shifting burden of persuasion undermines the "but for" test and reintroduces the confusion which *Wright Line* purported to eliminate. To understand why, it is only necessary to realize that in establishing a *prima facie* case, the General Counsel need not prove that antiunion discrimination was the "real cause" of the employee's discharge. Instead, the *Wright Line* procedure only requires the General Counsel to show that antiunion animus was "a" motivating factor in the employer's decision. If the employer then proffers a legitimate reason for its action, but does not do so with enough weight to carry the burden of persuasion, the Board would rule that the § 8(a)(3) charge had been proved. This would be so despite the fact that two factors—neither outweighing the other—had been advanced as causes, and the Board never determined which was the real one. As such, the procedural aspect of the rule is plainly at odds with the "but for" test.

The Board relies on the Supreme Court's decision in *Mt. Healthy* to support its allocation of the burden of proof. The employer there was required to prove by a

preponderance of the evidence that the same decision not to rehire an employee would have been reached even absent his constitutionally-protected activity. 429 U.S. at 287. *Mt. Healthy* is inapposite in its burden-shifting phase, however, because the Board is bound by statutory limitations which foreclose the issue. The Act itself imposes the burden of proving an unfair labor practice on the General Counsel. Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides in part:

> "If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

As interpreted by the Board's own regulations, this means that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. § 101.10(b) (1981). Moreover, § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976), states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Since none of these statutory or regulatory provisions were applicable in *Mt. Healthy*, the Supreme Court was free to allocate the burden of proof. The Board, on the other hand, has no power to shift that burden onto the employer.

We believe that the more appropriate precedent is found in the line of recent Supreme Court decisions outlining the procedure to be followed in Title VII employment discrimination cases. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). In those cases, the Court emphasized that the ultimate burden of proving discrimination rests upon the plaintiff; it never shifts to the defendant. If the plaintiff establishes a *prima facie*

case, the defendant must articulate some legitimate, nondiscriminatory reason for its action. The Court stressed that this is only a burden of going forward, not of persuasion. Should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons.[4]

Discrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from antiunion bias. The Supreme Court recognized the problems of proof in the *Burdine* line of cases, but concluded that only the burden of production, and not persuasion, shifts to the defendant. Since the same considerations are present where the discrimination is based on union activity, the Board should follow the *Burdine* procedure in those cases as well.

The *Wright Line* test was thoughtfully and thoroughly analyzed when it reached the United States Court of Appeals for the First Circuit. *NLRB v. Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (March 2, 1982). As we do today, the court welcomed the adoption of "but for" causation and rejected the Board's attempt to shift the burden of proof onto the employer. The court

[4] The *Burdine* opinion noted that the distinction between burden of proof and burden of production is a traditional feature of the common law. The Court said, "[i]n a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 450 U.S. at 255 n.8. Since the employer presumably is most likely to be in possession of evidence showing the real reason for its action, it must produce that evidence to rebut plaintiff's *prima facie* showing of discrimination. Nevertheless, the ultimate burden of proof remains on the discriminatee. We found the reasoning in the *Burdine* line of cases to be persuasive and applied it in a Title VI context. *See*, NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981).

also noted that the Board has mischaracterized the employer's burden of producing rebuttal evidence as an affirmative defense, which it in no way resembles. *Id.* at 905 n.9. We agree with the First Circuit, and believe that the Board failed to take into account the General Counsel's statutory burden to prove the unfair labor practice.

Before the First Circuit, as it does here, the Board relied on language in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), to support its allocation of the burden of proof. In that case, the employer discriminated between strikers and nonstrikers with respect to vacation pay. The Supreme Court said:

> "[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

Id. at 34. The First Circuit distinguished *Great Dane* because it involved "a challenge to an overall policy of the employer rather than to a single discharge." 662 F.2d at 904 n.8. We think a similar distinction applies to the case at hand.

More importantly, *Great Dane* was not concerned with the difference between the burden of production and the burden of persuasion, and terms applicable to both are used somewhat interchangeably throughout the opinion. For example, in the sentence preceding the one quoted above, the Court said that "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." 388 U.S. at 34. The Court then held that an unfair labor practice was proved because "the company came forward with no evidence of legitimate motives for its discriminatory conduct. . . . The company simply did not meet the burden of proof. . . ." *Id.* Notably lacking is

the precision the Court later applied in *Burdine* when it addressed the specific issues of the burdens of production and persuasion. On the whole, then, we are convinced that *Great Dane* does not run counter to the result reached by the First Circuit and us.[5]

From a practical standpoint, it is unlikely that the decision in many cases will turn on whether the employer's burden is characterized as being one of persuasion or production. Nevertheless, as the Board recognized in *Wright Line*, 251 N.L.R.B. at 1087, "[t]his distinction is a crucial one since the decision as to who bears this burden can be determinative." We think that fewer errors will result if the distinction is properly observed.[6]

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[5] In *Wright Line*, the Board seized upon a few remarks in the legislative history of the 1947 amendment to § 10(c) of the Act to support shifting the burden of proof. 251 N.L.R.B. at 1088. The First Circuit found this legislative history to be inconclusive, 662 F.2d at 904 n.8, and we are inclined to agree. In any event, we think there is little need to consult the legislative history because the statute is clear on the General Counsel's burden of proof and the Board's regulation is a significant expression of agreement on that point.

[6] Other Courts of appeals that have reviewed the *Wright Line* test have reacted to it with general approval, but only the First Circuit has scrutinized the burden-shifting issue in depth.

In the Fifth Circuit, TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981), is consistent with the First Circuit view. Two other cases, NLRB v. Charles H. McCauley Associates, Inc., 657 F.2d 685 (5th Cir. 1981), and NLRB v. Robin American Corp., 654 F.2d 1022 (5th Cir. 1981), merely recite the *Wright Line* test. In Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3773 (U.S. Mar. 23, 1982) (No. 81-1605), an employer's challenge to the shifting burden of proof is rejected without analysis.

In the Sixth Circuit, Charge Card Association v. NLRB, 653 F.2d 272 (6th Cir. 1981), held that the Board failed to prove its case under either the "dominant motive" test or the *Wright Line* rule. In NLRB v. Consolidated Freight Ways, 651 F.2d 436 (6th Cir. 1981), the court also denied enforcement. In NLRB v. Lloyd Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981), the court recited the *Wright Line* test but did not analyze it.

In summary, the Board's *Wright Line* test represents a substantial improvement over its prior practice and, except for its shifting burden of persuasion, meets with our approval. Under our formula, once the General Counsel has established a *prima facie* case of discriminatory discharge, the employer should rebut this with evidence of a legitimate business reason for its action. The ultimate burden of proof does not shift from the General Counsel and does not devolve upon the employer at any stage. Therefore, no violation may be found unless the Board determines that the General Counsel has proved by a preponderance of the evidence that the employer's antiunion animus was the real cause of the discharge.

This case must be remanded for reconsideration because the burden of proof was misallocated. The Board held that Behring failed to substantiate its economic defense because it could not justify the timing of the discharges. The relevance of that observation is not clear

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The Seventh Circuit said that it was adopting the *Wright Line* rule in Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981). The court seemed concerned only with its substantive phase, however, and the Board's petition for enforcement was denied. The same result occurred in NLRB v. Eldorado Manufacturing Corp., 660 F.2d 1207 (7th Cir. 1981).

In NLRB v. Fixtures Manufacturing Corp., ___ F.2d ___, No. 81-1398 (8th Cir. Jan 14, 1982), the Eighth Circuit rejected the First Circuit's approach and approved the Board's burden-shifting rule as within the latitude it should have in structuring its fact-finding process. The court did not discuss the constraints placed on the Board by the burden of proof assigned to the General Counsel by the Act, the Administrative Procedure Act, and the Board's own regulations.

In NLRB v. Nevis Industries, Inc., 647 F.2d 905 (9th Cir. 1981), the Ninth Circuit approved *Wright Line's* procedural shift, but again without discussion of the General Counsel's statutory burden of proof. *See also*, Doug Hartley, Inc. v. NLRB, ___ F.2d ___, Nos. 81-7368 and 81-7457 (9th Cir. Feb. 17, 1982).

from the Board's decision. The lay-offs occurred soon after the election and, therefore, could not have affected it.

Although the ALJ referred to testimony that the company was afraid the union would try for another election in the following year, the lay-offs could hardly have been further removed in time from that possible eventuality. Lay-offs were not limited to union activists and the Board did not find a suspicious pattern in the terminations. On the other hand, the company's evidence of shrinking revenues and mounting administrative costs was not simply "poor mouthing," but was substantiated by the ALJ's own findings and subsequent events, including closing of the warehouse.

The Board's citation of *Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980), is not helpful. In that case, the timing of the employer's action was significant because it could have had an influence on a pending election. No such considerations are present here. Since Behring did articulate a legitimate business reason for the discharges, and the General Counsel did not prove that the company's real motive was antiunion animus, the case must be remanded to the Board for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1937

BEHRING INTERNATIONAL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Present: GIBBONS, WEIS and GARTH, *Circuit Judges*

ORDER

It is ORDERED that the opinion heretofore filed in this case be amended as follows:

Add a footnote[4] on page 9 of the slip opinion, at the end of the carryover paragraph which ends "... the protected activity. ..." The footnote to read as follows:

> In Herman Bros., Inc. v. NLRB, 658 F.2d 201 (3d Cir. 1981) the employer argued that Wright Line is inconsistent with Edgewood Nursing Center, Inc. v. NLRB, and Gould Incorporated v. NLRB. The court left the question open, however, saying "[w]e need not decide here whether Wright Line and Third Circuit law differ." 658 F.2d at 208.

The succeeding footnotes will be renumbered accordingly.

BY THE COURT

JOSEPH F. WEIS, JR.
Circuit Judge

Dated: May 20, 1982

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1937

BEHRING INTERNATIONAL, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

JUDGMENT

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

THIS CAUSE came on to be heard upon a petition filed by Behring International, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on September 26, 1980, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 2, 1982, and has considered the briefs and transcript of record filed in this cause. On April 7, 1982, the Court, being fully advised in the premises, issued its opinion ordering enforcement of the Board's order in part and otherwise remanding the case to the Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Behring International, Inc., Edison, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities, sympathies, and desires, those of other employees, and as to the identities of employees active in bringing about Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America's (hereinafter called the Union) organizational campaign.

(b) Threatening employees that if the Union comes in or a representation election is conducted their work will be subcontracted or that the plant will be closed.

(c) Threatening employees with loss of benefits if they support the Union.

(d) Promising and granting employees a wage increase and other employment benefits to induce employees to abandon their support for the Union.

(e) Soliciting employees to request, in writing, withdrawal of the petition for a representation election.

(f) Deliberately reducing the work available to its employees in the period before a representation election by diverting freight and using contract labor to discourage employees from supporting the Union.

(g) Coercively informing employees that they would be better off without the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its Edison, New Jersey, location copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED that each party shall bear its own costs and that this case be remanded in part to the Board for further proceedings consistent with the Court's opinion.

By the Court

/s/ _____
JOSEPH F. WEIS, JR.
Circuit Judge

Dated: JUNE 14, 1982

Certified as a true copy and issued in lieu of a formal mandate on July 6, 1982

Test: M. Elizabeth Ferguson
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS GRANTING ENFORCEMENT OF THE BOARD'S ORDER IN PART AND OTHERWISE REMANDING THE CASE TO THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which we were represented by our attorney and presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT question you concerning your activities, sympathies, and desires as to Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or of the union activities and sympathies of other employees.

WE WILL NOT ask you for the names of employees who were active in bringing about the Union's organizational campaign.

WE WILL NOT threaten that your work will be subcontracted or the warehouse closed if you support, work for, or vote for the Union.

WE WILL NOT threaten to take away job-related benefits if you support or vote for the Union.

WE WILL NOT promise or give you pay raises or other economic or job benefits to persuade you to withdraw your support for the above-named Union, or any other labor organization.

WE WILL NOT solicit you to request withdrawal of any petition for representation election or to withdraw your support from the Union.

WE WILL NOT seek to induce you to encourage our other employees to withdraw their support from the Union.

WE WILL NOT deliberately reduce the work available to you in the warehouse by diverting freight, using contract labor or other means, to discourage you from supporting the Union.

WE WILL NOT coercively inform you that your [*sic*] are better off without the above-named Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as amended.

BEHRING INTERNATIONAL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201—645-2100.

APPENDIX C

Behring International, Inc. *and* Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 22-CA-7824

September 26, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On June 8, 1979, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and a document marked "verification petition supplementing the record below."[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[2] findings,[3] and conclu-

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[1] Respondent's request for oral argument is hereby denied, inasmuch as the record and brief adequately present the issues to be decided.

[2] Respondent asserts that the Administrative Law Judge exhibited bias against Respondent in certain of his rulings and comments during the hearing. We have carefully examined the record and find no merit in this contention.

Respondent asserts that it should have been allowed to adduce testimony from Board Agent Susan Anderson concerning "her investigation of the initial charge as well as certain affidavits and other material." Respondent asserts that the testimony and documents would have contained admissions from various witnesses who testified, obtained when Anderson solicited a withdrawal of the original charges filed against Respondent. At the hearing, the Administrative Law Judge revoked the subpena. We are satisfied that the testimony sought by Respondent

sions[4] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[5]

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fell within the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB," *Stephens Produce Co., Inc.* v. *N.L.R.B.*, 515 F.2d 1373, 1376 (8th Cir. 1975), and that Respondent has shown no substantial reason to disregard this privilege. We note that, upon proper request, Respondent was given access to the prior statements by the General Counsel's witnesses following their testimony on direct examination. We further find that the evidence sought to be adduced is irrelevant to any issue in this proceeding. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena of Board Agent Anderson.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings, with one exception.

In fn. 17 of his Decision, the Administrative Law Judge credited testimony by employee Michael Jaconski, which was denied by Station Manager James Waters, to the effect that a handwritten employee petition was signed by employees and taken to Waters, and that Waters then asked that the petition be typed. We note that Jaconski, whose testimony was generally discredited by the Administrative Law Judge, was the only witness who testified to the signing of a handwritten petition, and that both the General Counsel's witnesses and Respondent's witnesses testified specifically that only the typed petition was signed by employees. We therefore find that only the typed petition was signed before Waters received it, although this finding does not detract from our finding, in agreement with the Administrative Law Judge, that Respondent instigated the meeting and the formulation of an employee petition requesting the withdrawal of the petition for an election.

[4] We take administrative notice of the fact that, following the close of the hearing herein, a change occurred in the leadership

In finding that Respondent unlawfully laid off its employees and subcontracted out its work, the Administrative Law Judge observed that Respondent had not established any reason for taking these actions at the time it did. Thus, he noted that the layoff and subcontracting occurred shortly after unlawful threats and grants of benefits in response to an organizing campaign. Moreover, the employees at the facility in question had been praised recently for the quality of their work. The Administrative Law Judge noted that two employees who attempted to forestall the election were retained at higher rates of pay following the subcontracting, while those employees who had not distinguished themselves by their opposition to the organizing effort, as well as those employees who had

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of Iran, Respondent's primary customer at its Edison facility. In its "verified petition supplementing the record below," Respondent alleges that, as a result of this change, it reduced and later closed its operations at the Edison warehouse. We shall leave to the compliance stage of these proceedings the determination of the timing and nature of the impact of Iran's change in leadership on the operations at the facility involved herein, as well as the period during which employees would have worked had it not been for Respondent's unlawful layoff of employees and the subcontracting of its operations.

[5] The Administrative Law Judge found that the instant violations go "to the very heart of the Act" and recommended that Respondent be ordered to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their protected Section 7 rights. In our recent Decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall narrow the recommended Order and notice to proscribe only "like or related" conduct.

supported the Union, were laid off. Finally, Respondent can point to no contemporaneous event which might have motivated the layoffs at that time. Accordingly, although Respondent has proffered an economic defense, we find that Respondent has failed to substantiate that defense with probative evidence that it would have subcontracted out its operations at the time it did had it not feared the resumption of organizational activity.[6] For this reason, we find that Respondent has failed to rebut the General Counsel's *prima facie* case and, like the Administrative Law Judge, we therefore conclude that Respondent unlawfully laid off its warehouse employees and subcontracted its warehouse work.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Behring International, Inc., Edison, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(i):

"(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

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[6] For a general discussion of the burden of going forward once a *prima facie* case of unlawful discrimination has been made out, see *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which we were represented by our attorney and presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT question you concerning your activities, sympathies, and desires as to Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or of the union activities and sympathies of other employees.

WE WILL NOT ask you for the names of employees who were active in bringing about the Union's organizational campaign.

WE WILL NOT threaten that your work will be subcontracted or the warehouse closed if you support, work for, or vote for the Union.

WE WILL NOT threaten to take away job-related benefits if you support or vote for the Union.

WE WILL NOT promise or give you pay raises or other economic or job benefits to persuade you to withdraw your support from the above-named Union, or any other labor organization.

WE WILL NOT solicit you to request withdrawal of any petition for representation election or to withdraw your support from the Union.

WE WILL NOT seek to induce you to encourage our other employees to withdraw their support from the Union.

WE WILL NOT deliberately reduce the work available to you in the warehouse by diverting

freight, using contract labor or other means, to discourage you from supporting the Union.

WE WILL NOT coercively inform you that you are better off without the above-named Union or any other labor organization.

WE WILL NOT subject you to discharge or layoff because of your support for the above-named Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Ray Stromberg, Eric Stromberg, Clara Kitson, Michael Lanza, Eugene Colacino, Anthony Ippolito, Edmund Ringen, and Joseph Sanders immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make each of them whole, with interest, for losses they may have suffered by reason of our discrimination against them.

BEHRING INTERNATIONAL, INC.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard in Newark, New Jersey, on a complaint based upon a charge and first amended charge filed by Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. The complaint, as amended at the hearing, alleges that Behring International, Inc., herein called the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by coercively interrogating certain of its employees concerning their membership in, activities on behalf of, and sympathies for the Union; by offering, promising, and granting its employees wage increases and other employment benefits in order to undermine their support for the Union; by warning its employees that they would be discharged if they became or remained union members; and by coercively informing its employees that they would be better off without a union; and violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off a total of eight employees on May 6 and June 3, 1977,[1] and replacing them with employees of an independent contractor.[2] With respect to certain of these allegations, the General Counsel, contrary to the Respondent, contends that Robert Lesniakowski and Michael Jaconski, warehouse employees, acted as

[1] All dates hereinafter are 1977 unless stated to be otherwise.

[2] The Employees laid off on May 6 were Ray Stromberg, Clara Kitson, and Michael Lanza. The employees laid off on June 3 were Eugene Colacin[o], Anthony Ippolito, Edmund Ringen, Eric Stromberg, and Joseph Sanders.

agents on behalf of the Respondent within the meaning of Section 2(11) of the Act.

The Respondent, in its answer, denied the commision of any unfair labor practices. Counsel for the General Counsel and the Respondent have filed briefs which have been carefully considered.

Upon the entire record, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Texas corporation, is engaged in the business of providing warehousing and related services at its place of business in Edison, New Jersey, its only facility involved in this proceeding. In the course and conduct of the Respondent's business operations during the 12 months preceding issuance of the complaint herein, a representative period, the Respondent caused to be purchased, transferred, and delivered to its Edison warehouse goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said warehouse in interstate commerce directly from States of the United States other than the State of New Jersey.

In accordance with the foregoing conceded facts, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates a warehouse in Edison,

New Jersey,[3] where with its New York, New York, office it serves as the purchasing, storage, and freight-forwarding arm of the air force of a foreign government which, during the time relevant herein, obtained much of its material in the United States. Equipment procured by the customer government, often with the assistance and support services of the Respondent, would be received and stored at the Edison warehouse prior to transshipment to the purchasing country. This operation was under the general supervision of George Murphy, the Respondent's vice president and director of military programs. Murphy, who reported to the Respondent's president, Alan Newhouse, was responsible for both the New York City and Edison facilities and had established the Edison warehouse in November 1975. In 1977, during the events considered herein, James Waters was the Edison station manager in immediate charge of that warehouse's operation, and Thomas (Wier) Wiercizewski was the warehouse supervisor and Waters' assistant. The parties are in agreement that all of the above-named individuals are supervisors within the meaning of Section 2(11) of the Act.

With the assistance of employee Eric Stromberg, who had made initial contact in February, the Union began its organizing campaign among the Respondent's warehouse employees, conducting its first meeting on March 13 at a restaurant near the Edison warehouse. This was attended by Union Business Representative John Senick and about 9 of the Respondent's 14 warehouse employees. Among those who attended that meeting and signed union authorization cards were Lesniakowski and Jaconski, both who were both employed by the Respondent as rank-and-file warehousemen.

[3] Nationally, the Respondent also operates about eight other warehouses.

On March 22, the Union filed the petition in Case 22-RC-7093 for a representation election among the Respondent's warehouse employees and, pursuant to an Agreement for Consent Election approved on April 7, an election was conducted on April 25. Although the Union was not successful in the election and here questions certain of the Respondent's preelection conduct, no objections to the election were filed.[4]

B. *Alleged Acts of Interference, Restraint, and Coercion*

1. The employee meeting of March 31

Evelyn Barbato[5] testified that, on March 31 at approximately 9 a.m., she and all the other warehouse employees were called by Lesniakowski and Jaconski to an immediate meeting in the conference room. No supervisors were present.

When assembled, Lesniakowski told the employees that he and Jaconski had spoken with Waters, and that Waters had stated that he was going to either subcontract the work or close down the warehouse if the Union were voted in. In the discussion that followed, various employees asked if Lesniakowski was certain of this and all wanted to know why he and Jaconski had gone to the office themselves without having asked anyone else. Barbato recalled that Lesniakowski left the conference room on several occasions during the meeting, returning each time. On one occasion after leaving, he returned and announced that, if the employees wrote and signed a petition against the Union, then

[4] The agreed-upon unit included all warehouse employees employed by the Respondent at its Raritan Center, Edison, New Jersey, facility, but excluding all office clerical employees, professional employees, managerial employees, and guards and supervisiors as defined in the Act.

[5] Barbato was employed by the Respondent in various warehouse positions from October 1975 to May 4, 1977, when she was terminated for reasons unrelated to this proceeding.

Station Manager Waters would not do anything to them; there would be no retribution. They could keep their jobs if the petition could stop the Union. Barbato, in longhand, then wrote a document rejecting the forthcoming election, which was dictated to her by someone present. Jaconski took the page from her, left the room, and returned with the following typed version of Barbato's draft:[6]

3-31-77

To: Jim Waters, Station Manager
From: Whse.
Subject: N.J. [sic] Labor Board

We, the Whse. of Behring International agree to withdraw our union petition from the N.J. [sic] Labor Board.

Before signing the petition, however, the employees agreed that they did not want Lesniakowski and Jaconski to take the paper by themselves to Waters' office but that someone else should go with them. It generally was agreed that Barbato should accompany the two men to Waters' office when they took him their petition. The employees then signed the typed page in alphabetical order and broke for lunch at or about noon.

Lesniakowski and Jaconski, who ate together, had agreed to meet Barbato in the conference room after lunch and go together to Waters' office. However, when Barbato returned at or about 1 p.m., she found that Lesniakowski and Jaconski had already gone to Waters' office without her. She went to the office area in search of them and encountered Warehouse Supervisor Wier in the reception room. Wier told Barbato that Lesniakowski and Jaconski were in Waters' office. The door to that office was closed. When Barbato replied that she was supposed to be in Waters' office with

[6] The record reveals that the document had been typed on the Respondent's stationery by an expeditor. Jaconski testified that he had had Barbato's draft typed at Waters' insistence.

Lesniakowski and Jaconski, Wier told her that they were not to be disturbed. Barbato persisted that she was supposed to be in Waters' office with them and Wier repeated that Waters said that he did not want to be disturbed. Barbato returned to the conference room where the other employees had reassembled after their lunch break to await the return of Lesniakowski and Jaconski.

Jaconski and Lesniakowski, on reentering the conference room, replied to Barbato's question as to why they had not waited for her by stating that Waters would not have spoken in front of her. The employees then began to draw up a list of items they wanted from the Respondent, including overtime pay after an 8-hour workday,[7] a grievance committee, equal pay to all employees for equal work, and no repercussions because of the employees' previous support for the Union. These proposals were written by Ray Stromberg.[8]

According to Barbato, Lesniakowski took the employees' proposals out of the room and later returned stating that Waters had said that he was not certain as to what could be done with regard to a grievance committee but would give the employees an answer to that matter later. Waters could not himself decide whether the other items could be granted but would have to seek approval from the Respondent's main office in Houston, Texas. The meeting then broke up at approximately 3:30 p.m.

Barbato's account of the March 31 meeting was substantially corroborated by employees Eric Stromberg, Edmund Ringen, Eugene Colacino, and Anthony Ippolito, all of whom recalled that Lesniakowski and Jaconski had called the meeting, at which Lesniakowski had

[7] At that time, overtime premium pay was available only after an employee had worked for 40 hours in a given week, although he may have worked more than 8 hours on a given day.

[8] Employees Eric and Ray Stromberg are brothers.

announced that he and Jaconski, concerned about their jobs, had been talking to Waters, who had informed them that there was a good chance that if the employees voted for the Union the Respondent would close the warehouse or subcontract the work. If the employees would sign a paper to end the union election, there was a good possibility that the two men could talk Waters out of attempting to close the warehouse or subcontract the work. Ippolito, however, recalled that the employees had attempted unsuc[c]essfully to condition their signing the request to withdraw the representation election petition on Waters' agreement in writing to the employees' list of demands from the Company. Lesniakowski, however, had reported to the group that Waters would [not] agree to the list of employee proposals in writing, as, the situation being what it was, Waters did not want his name to appear on aything written.[9]

Ippolito and Eric Stromberg recalled that, before the meeting ended on March 31, the employees elected a three-member grievance committee, which included the two Strombergs and Sanders. In addition, Stromberg and Jaconski recalled that Waters personally came to the March 31 meeting shortly before it ended. Stromberg related that Waters encouraged the employees to elect a grievance committee, which was done, and also discussed various grievances with the committee and the other employees, including the matter of equal pay for equal work, agreeing that all should be paid on an equal basis for the same warehouse work.[10]

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[9] These employees signed the election petition withdrawal request although Waters did not grant all their demands because, after some discussion, it was concluded that they still would be better off signing and hoping for the best.

[10] Jaconski's recollection of the March 31 meeting of which he clearly was a cosponsor and principal participant was so unconvincingly poor and his testimony so evasive that absent independent corroboration he is not credited where his testimony conflicts with that of other witnesses. As the other witnesses to

The employees were paid for the time spent at the March 31 meeting, their signed request for withdrawal of the election petition was retained by Waters, and the March 31 meeting conducted by and among employees without supervisors, which consumed the time of the entire warehouse staff for virtually the whole workday, was unprecedented at the Edison warehouse.[11]

Lesniakowski testified that immediately before telling the employees to go to the meeting on March 31 he and Jaconski had asked Waters for the use of the conference room to discuss with the employees what was happening in the warehouse, the union problem, and other matters. Waters had told them to use the conference room if it was all right with Warehouse Supervisor Wier, who thereafter assented to the meeting after being assured that Waters had not objected.

Lesniakowski related that he and Jaconski then gathered all the warehouse employees into the conference room where he did most of the talking. Lesniakowski told the group that the way everything was going[12] it was very possible that the Company would subcontract the work. It was also possible that it would close up. Lesniakowski stated that the Respondent could do either one of the two and the employees would all be out of work and collecting unemployment. Accordingly, Lesniakowski stated his belief that, if the employees

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the March 31 meeting did not testify that Waters had come to the conference room toward its end and as Stromberg, the only other witness to agree with Jaconski on this point also showed a poor general recollection of events, I find from the weight of the evidence that Waters did not appear at the March 31 meeting, but that a grievance committee was elected which thereafter was recognized by management, and which processed grievances in the time period before the election.

[11] That night, Eric Stromberg reported the meeting to Senick, the union representative, who told him not to worry.

[12] At the time of the meeting, business volume was low in the warehouse.

drew up a petition to withdraw the union election while they still had jobs, everything would continue and the employees would have work. If they did not do this and the Union came in, nobody knew what was going to happen. Accordingly, Lesniakowski stated that the union matter was an important thing to resolve and the employees should settle down, go back to work, and keep their jobs.[13]

Lesniakowski conceded that while the conference was in session he left the room several times for various reasons, but asserted that he went to Waters' office only after the petition was signed to take it to him. In this, he was accompanied by Jaconski and Barbato. However, when they arrived in the office area, Waters' assistant, Joyce Hesse, informed them that Waters was out to lunch. Accordingly, Lesniakowski left the petition on Waters' desk and they all returned to the conference room. While still in the conference room, someone reported that Waters had returned from lunch and

[13] Lesniakowski denied that he had used Waters' name as the source of his concern and proposed antiunion document, but testified as to two reasons for telling the employees on March 31 that if an election were held the Respondent would subcontract their work. The first was his knowledge that at the time in question freight which otherwise would have been delivered to the Respondent's Edison warehouse was being diverted to the nearby warehouse of Summit Associates, whose employees were handling it, and, second, because of an incident about 3 days before the March 31 meeting. At that time, while seated two stools down from Warehouse Foreman Christopher Houlihan at a bar, Lesniakowski overheard Houlihan tell an acquaintance that the freight was being diverted to the Summit building and that it looked as though "they" were going to subcontract out the work if the Union came in. Contrary to the Respondent's argument, I find that, although this incident occurred in a public place, Lesniakowski was sufficiently near to Houlihan for the latter to have been aware of his presence when he spoke, and, in view of Houlihan's other conduct found below, it is concluded that Houlihan intended that Lesniakowski hear his remark.

was in his office. It was then that Lesniakowski, accompanied by Jaconski, returned to the office.

On being reassured by Waters that he was too busy to see them, Lesniakowski picked up the petition, which was still on Waters' desk, and stated that everyone in the warehouse had drawn up a petition to withdraw from the Union. Waters replied that he could not answer any questions but would give the petition to someone to examine.

Lesniakowski, too, recalled that of [*sic*] overtime, paid medical benefits, a grievance procedure, and equal pay for equal work were discussed at the March 31 meeting.[14]

Lesniakowski and Jaconski both denied that they had acted as agents for the Respondent in conducting the meeting and that they had interrogated any employees concerning their union sympathies or activities.[15]

Waters testified that he had told Jaconski and Lesniakowski that they could use the conference room for the employees' meeting when they had requested its use so that the employees might discuss the union matter among themselves. He told them that it was their conference room as well as everyone else's but refused to talk to them about the Union. By his estimate, about 15 minutes after this conversation, Waters left for lunch.[16]

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[14] Lesniakowski testified that, approximately 3 days after giving Waters the petition on March 31, he encountered Waters in the warehouse and asked if Waters thought that the petition was the right way. Waters told Lesniakowski that he had a right to do whatever he wanted.

[15] As noted, both Lesniakowski and Jaconski earlier had signed authorization cards at the union meeting of March 13.

[16] Waters denied Jaconski's account that, during the lunch period that day, Jaconski and Lesniakowski had encountered him at a nearby restaurant at which time the two employees had told Waters that the employees had signed the petition. As

When Waters returned to the office, he found the petition signed by the employees on his desk. Although the petition had been typed on the Respondent's stationery, Waters testified that this was the only copy of the petition that he had seen and did not know how it had come to be typed.[17]

Waters conceded that he never checked on how long the meeting had lasted either personally or by asking his supervisors. His only conversation that day with Jaconski and Lesniakowski was when he gave them permission to use the conference room.

In evaluating the evidence herein, I do not find Waters to be a credible witness. In spite of his clear involvement in authorizing the March 31 meeting and the general testimony of his dealings with Lesniakowski and Jaconski while it was in progress, he testified that he had no knowledge of the meeting's substance and duration, although it occupied his entire work crew for nearly a full day. As the weight of evidence, as will be discussed below, established Waters as a participant in much of the activity found unlawful herein, his testimony is not deemed reliable.

2. The preelection diversion of freight from the Respondent's warehouse

The General Counsel contends that in April, during the weeks preceding the election, the Respondent rerouted freight destined for the Edison warehouse to a

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Jaconski's testimony, noted above, is generally discredited, Waters' denial of this incident is accepted.

[17] This denial contradicts Jaconski's testimony that the handwritten petition originally brought to Waters was typed at Waters' insistence. While Jaconski's testimony generally is not credited, his testimony in this regard is accepted as the almost daylong meeting certainly required company approval and as it appears most unlikely that a warehouseman could have required an expeditor to type the document on company stationery without supervisory authorization. Accordingly, it is found that the petition was typed at Waters' direction.

facility 1 block away, owned and operated by another company, Summit Associates, and that this had been done to further drive home the message of the March 31 meeting that work in the warehouse was scarce and that if the employees voted in the Union their jobs would be in jeopardy. The Respondent, in turn, contends the freight was diverted to Summit to reduce the content of the warehouse and thus make room for the application of a sealant to the warehouse floor to end a dust problem.

Thomas Wier, who at the time of the events herein was warehouse supervisor,[18] testified that about a week before the April 25 election Waters had told him that the Respondent was going to start subcontracting work to Summit Associates and had instructed Wier to send trucks arriving with freight at the Respondent's receiving dock to the Summit warehouse where it was to be received and unloaded. Waters told Wier that the Respondent wanted the men to see an empty warehouse and to let them think a bit on the union matter.

The General Counsel argues that, in the context of Waters' testimony that April was part of a slow period at the Edison warehouse and that studies were then being made to determine how labor costs could be reduced, the Respondent's manner of preparing for the floor sealant application was singular. Although Waters testified that the Respondent did not receive a cost breakdown for the respective storage and labor services furnished by Summit during this priod, but, rather, received an all-inclusive bill, Respondent's Exhibit 11, which evidences the arrangement for these services, reveals that Summit billed the Respondent at a stated rate for the space in minimum units of 1,440 square feet and also for separate labor costs of $9.10 per hour,

[18] Wier, called as a witness by the General Counsel, was employed by the Respondent from November 1975 until severed on about October 7, 1977.

which rates were substantially higher than that paid by the Respondent to its own warehouse employees. The Respondent's determination to use Summit labor almost exclusively to handle the diverted incoming freight during this period and to use its supervisors to move in-house inventory from the floor area to be sealed to other parts of the warehouse proceeded in the face of Waters' statement that the Respondent's employees did not at that time have enough work.

The sealant was applied on April 16 and sometime after that but before the election the Respondent stopped diverting freight to Summit.

Waters in turn testified that it had been necessary to divert this freight in order to reduce the quantity of material in the warehouse and to enable inventory already in the warehouse to be moved out of the way so that the warehouse floor could be chemically sealed in response to a dust problem. Although it only took 1 day to apply the sealant, which dried in 48 hours, additional weeks had been needed in advance in order to make the necessary preparations. These included emptying and cleaning the warehouse so that the sealant would take and moving freight out of the way as required. Waters related that he first had authorized the contractor to do the sealing work in February but the start was delayed by uncertainty as to how much of the warehouse floor was to be sealed. Whatever was done in preparation for the floor sealing, including the diversion of freight and the rearrangement of in-house material, had been done at the contractor's instructions.

Waters explained that his decision to use Summit labor was not unusual as in the past the Respondent, had done business with Summit Associates, as the situation required. From the time the Respondent had assumed the foreign air force account in November 1975, when the Edison warehouse opened, through April 1976, a busy interlude, the Respondent had augmented its own work force by using three to six employees provided by

Summit. In that interval Summit employees worked at the Respondent's warehouse with the Respondent's own employees sorting freight and driving two trucks. In the slower periods which followed, the Respondent discontinued the use of outside labor as unnecessary, and did not again resort to Summit until March 1977 in connection with the Respondent's floor sealing operation.[19] In March and April no freight was transferred from the Respondent's warehouse to Summit, but incoming shipments were diverted to the Summit warehouse and stored there until shipped to the customer country.

3. The alleged unlawful pay raises and other improvements in job benefits

The General Counsel contends that in the preelection period the Respondent promised and granted various unlawful pay increases to discourage employee support for the Union.

Specifically, the General Counsel argues that the Respondent, in the preelection period, reclassified and granted accompanying pay increases to Michael Jaconski, Clara Kitson, and Michael Lanza. In late March these three employees, without evaluation, were reclassified by the Respondent from the designation of receiving clerk to warehouseman.[20] All three employees testified that, while working as receiving clerks in parcel post, their jobs had been to consolidate and segregate freight by priority and to containerize the goods. Their duties remained the same after their reclassifications, which involved only the change of title to ware-

[19] Waters' testimony that the Respondent began to use Summit in February and March in connection with the floor sealing procedure is contradicted by the Respondent's arrangement for Summit's services, which is dated March 28 and by its terms contemplates that Summit's services would be rendered in the future.

[20] Kitson and Lanza were reclassified effective March 26 and Jaconski on March 28.

housemen and the increased compensation.[21] The explanation given to the employees by Waters for their reclassification at that time was that the receiving clerk classification was being eliminated.

Waters testified that under the Respondent's pay policy as it was in the first half of 1977 employees received salary and performance evaluation 90 days after employment, and thereafter received evaluations and warranted pay increases, consecutively, 6 months after the anniversary date of their employment, 1 year after the anniversary date, and every 6 months thereafter. Under this evaluation system, employees could receive either no raises for bad performance or could receive increases of 4, 6, or 8 percent, respectively, depending upon how highly they were rated, until they reached the highest pay rate available for their job classifications. Accordingly, employees Eric Stromberg and Sanders both were evaluated by the Respondent in January and, respectively, were found to merit pay increases of 4 percent. However, they were informed at the time that, as they had reached the top of the pay scale for their respective jobs, they would receive no increments. However, both Sanders and Stromberg later received pay increases effective April 27, made retroactive to their January evaluation dates. The April 27 increases, part of a general across-the-board raise for all employees, was given without use of the Respondent's evaluation procedures.[22]

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[21] In being reclassified to warehousemen, Kitson received a monthly increment of $207 while Jaconski and Lanza each received $238.80 a month.

[22] I find no merit to the General Counsel's contention that employees Anthony Ippolito, Edmund Ringen, and William Tidemann, all of whom received pay increases on April 9, had received them unlawfully because they were given in the preelection period. Rather, the payroll evidence shows that they each had received their previous increments on October 9 and at like intervals before then. It is therefore concluded that their raises of April 9 were consistent with the Respondent's

In addition to granting the foregoing preelection raises to Lanza, Kitson, and Jaconski, the General Counsel contends that the Respondent also unlawfully promised a general across-the-board wage increase before the election, which was paid shortly after the election was conducted.

Employee Ippolito testified that, in the period between the filing of the petition in the representation case and the conduct of the April 25 election, Waters, at a meeting of employees, promised to provide such an across-the-board increase. On that occasion, Waters told the employees that he was trying to fight for equal pay for equal work in the warehouse and that $300 per week per employee was a justifiable wage. Although Ippolito agreed that the concept of equal pay for equal work had been discussed before the petition was filed and again after the election, this was the first instance where the specific figure of $300 had been mentioned.

The Respondent's payroll records reveal that a general across-the-board pay increase was given to all warehouse employees effective April 27, bringing their pay rate to the uniform scale of $300 per week or $1,300 per month. At the same time, the three parcel post employees who worked in the small package area, Ringen, Barbato, and William Tiedemann, were raised to approximately $280 per week or $1,217.88 per month.[23]

Waters testified that 1 or 2 days after the April 25 representation election he conducted a meeting in the conference room with the entire warehouse staff. Waters asked the employees if they had any complaints and suggested that the employees should submit any ideas for improved conditions in the warehouse to him

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longstanding policy of affording pay raises at 6-month intervals as warranted by its calculations.

[23] The reason for paying less money to the employees in the small package area was that their work was lighter and less demanding. These positions were usually filled by older male and by female employees.

and he would see what he could do. Waters emphasized that he could not guarantee anything. A few days later Waters received a handwritten list itemizing the employees' proposals. Included in this list were employee requests for equal pay for work, paid hospitalization insurance, a grievance committee, and other unrecalled items.

On the day Waters received the list he read it to the Respondent's vice president, Murphy, who, in turn, reported its contents to the Respondent's president, Newhouse. Within 4 or 5 days of receiving the list from the employees, Murphy informed Waters that certain of the items on the list had been agreed to by the Respondent and some were unacceptable. Among the items approved by the Respondent was a provision for overtime pay at time and a half after 8 hours per day rather than after 40 hours per week, the grievance committee, and equal pay for equal work at the above-referred rates for warehouse and parcel post employees. According to Waters, the raises were to become effective 2 to 3 weeks after the election and were not to be retroactive.[24]

The Respondent denies that any of the pay raises and reclassifications were granted as a result of or to counter the Union's organizational campaign, and argues that the across-the-board increase and other benefits did not become effective until after the election, to which no objections had been filed.[25]

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[24] The Respondent did not agree to the employee proposal for paid hospitalization insurance.

[25] Waters' testimony with regard to the timing of the across-the-board pay increase, as noted, is contradicted by the Respondent's payroll records, which show that the raise became effective on April 27, the date that Waters testified that he first suggested to the employees that they submit their proposals for improved job benefits. Also, while it is true that no objections to the election were ultimately filed, as noted, such objections still could have been timely filed after April 27 when the raises were given. Had objections been filed the raises thus given

As indicated in the General Counsel's brief, the Respondent produced no evidence of a general across-the-board pay increase for employees at any location other than the Edison warehouse.

4. The alleged threatened loss of job benefits

Employee Edmund Ringen testified that in March or early April, after the filing of the representation case petition, he and other warehouse employees were summoned to a meeting called by the Respondent's vice president, Murphy. Ringen recalled that Murphy told the employees that he had been to the National Labor Relations Board, that a date for an election had been agreed upon, and that he would like everyone to vote. If the vote resulted in a tie, the Company would win, and that was what he hoped for.[26] Employee Anthony Ippolito related that Murphy on that occasion had announced that he had just returned from the road and was looking for more contracts for the Respondent as the Company just could not depend on the one (foreign air force) contract that it had. Murphy said that that there was a chance they might get some new contracts and, if the employees did not organize things looked good.[27]

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would have been unlawful. See *Belcor, Inc., d/b/a Modesto Convalescent Hospital*, 235 NLRB 1059, 1063 (1978).

[26] Murphy testified that he met with the warehouse staff on about April 8 at which time he announced that agreement had been reached for a Board-conducted election on April 25. The employees were encouraged to vote as this decision affecting their future should not be reached by default. Murphy stated that he was precluded from trying to influence the employees in any way, and further stated, "What will be will be and the Company will go on from there."

[27] Ippolito was also present at a meeting of all employees before the election in which the Respondent's president, Newhouse, praised the work of the Edison warehouse employees, described the customer air force's satisfaction with their per-

Ringen also testified that in April, before the election, he and the other warehouse employees attended a meeting called by Station Manager Waters and his assistant, Joyce Hesse. On that occasion Waters asked the employees what their problem was. When there was no answer, Waters said that if the employees did vote for a union he probably would handle the negotiations and there was a good chance, that they would loose their stock option plan, profit-sharing plan, and pension benefits. Ringen interjected that as the employees had vested rights how could they lose these benefits? Waters did not reply.

Employee Michael Lanza averred that at a preelection meeting of all warehouse employees Waters described the Respondent's stock plan, telling the employees that if they were employed for 2 years they would receive stock in the Company. After a while, the employees would start to own the Company. Waters told the employees that the Respondent's branch in New York had a union but did not have the stock plan.[28]

Before the election, Waters also met with the warehouse staff, divided into separate groups, to discuss employee grievances. Ringen testified that he and members of his group, when they met with Waters, told him of their desire for overtime pay after 8 hours of work each day and of their wish for more pay. Waters stated his agreement with the employees but told them that they were dealing with a southern-based

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formance, and called them the best warehouse employees in the Respondent's organization.

[28] At the time in question fringe benefits provided for its employees by the Respondent, in addition to paid vacations, holidays, and Christmas bonuses, included the following companywide benefits: hospitalization and major medical insurance, the Respondent's stock program whereby the Respondent made stock purchases for eligible employees, and a profit-sharing program. While, as noted, these last programs were companywide, not all of the employees had sufficient service to be eligible.

outfit. He said that he would see what he could do when he went to the Respondent's Houston headquarters.[29]

Waters, in turn, testified that before the election he conducted two meetings with the warehouse staff. The first was in the beginning of April at which time he merely read verbatim a prepared statement to the staff, saying nothing more than what was contained therein. The statement announced the coming election, the date and time, and advised the employees of their right to participate therein, and reassured them that no effort would be made by management to harass or intimidate anyone involved in the election procedure. The General Counsel does not contend that the verbatim statement assertedly read to the employees contained unlawful language.

Waters described a second meeting of all warehouse personnel conducted later in April when he told the employees of the profit-sharing and stock option plans, the existing hospitalization, sickpay, and other benefits. On that occasion, employees asked questions as to the available fringe benefits. Waters denied having threatened employees with the loss of existing benefits if they voted for the Union.

5. The alleged unlawful interrogations

Warehouseman Sanders testified that on April 22, just 3 days before the election, he stopped for a drink at a nearby bar and restaurant where he joined Supervisor Houlihan and Lesniakowski at a table. After several minutes of general discussion, Lesniakowski asked Sanders what he thought about the Union and how he was going to vote. Sanders replied that he would vote "no,"

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[29] Ringen's testimony on this point is, in substance if not in time, corroborated by that of Jaconski, who related that, when Waters came to the conference room at the conclusion of the March 31 meeting, he promised the employees that he would check with the main Houston office on the matter of obtaining equal pay for them.

as he did not believe the Union was going to win. Lesniakowski then asked how Sanders thought everyone else was going to vote. Sanders answered to best of his knowledge.

About 35 minutes later, Lesniakowski departed, leaving Sanders and Houlihan alone at the table. Sanders testified, still without contradiction, that Houlihan asked what was the matter with those people. When Sanders asked if he meant the people at Behring, Houlihan replied "Yes." Houlihan declared that he did not understand why those people could possibly want the Union, repeating this statement. Houlihan noted that the Respondent was a good company to work for with profit-sharing and stock ownership plans. Employees were not pushed by the supervisors to work harder and if anyone asked for time off they received it. Sanders replied that he guessed that the employees felt that they needed the time off because they did not receive overtime pay after 8 hours' work and had to work overtime on Saturdays and Sundays when the warehouse was busy. Sanders declared that people were completely fed up with the conditions there. Houlihan then asked Sanders how he felt the other employees were going to vote and how Sanders would vote, the same questions earlier put to him by Lesniakowski. Again, Sanders stated that he was going to vote "no," and gave his estimate of how the various other employees were going to vote. Houlihan then asked who had started the Union. Sanders replied that Eric Stromberg had started the Union along with his brother, Ray, the two having contacted the union delegate.

As a sequel to the above incident, Eric Stromberg testified that after work on June 3, the day he was laid off, he went out for the evening with Houlihan and a number of the Respondent's employees. Later, after dinner and a number of drinks, he was left alone with Houlihan at a bar. In the course of their conversation,

Houlihan told Stromberg that it was all Stromberg's fault that everyone was getting laid off and the whole union thing. Stromberg said that it was not, that the Union was not his idea alone, but that actually it was Houlihan's fault. Houlihan had hired three men into the warehouse at pay rates higher than several incumbent warehouse employees were receiving at the time. Stromberg told Houlihan that he had been approached by Lesniakowski and Jaconski about bring in the Union, which was what had started the ball rolling. Houlihan, however, persisted that the Union was Stromberg's fault. As Houlihan was becoming increasingly belligerent, Stromberg left.

6. The alleged unlawful layoffs and postelection contracting

On May 6 the Respondent laid off Ray Stromberg, Clara Kitson, and Michael Lanza and on June 3 laid off Eugene C[o]lacino, Anthony Ippolito, Edmund Ringen, Eric Stromberg, and Joseph Sanders, all warehouse employees, while concurrently contracting for labor services to be provided by ESP, Inc., an outside firm.[30] The record also reveals that Lesniakowski and Jaconski, the sponsors of the March 31 employees' meeting, were not laid off but were assigned to work under a new supervisor in quality control. The record reveals that in their new quality control assignment their duties remained what they had been as warehousemen except that they also were responsible for training new warehouse personnel provided and employed by ESP, Inc.[31]

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[30] ESP, Inc., had been established by two men not connected with Summit Associates, one of whom earlier had worked for the Respondent on an efficiency report.

[31] Ringen testified that after the election and subsequent to the start of the layoffs Jaconski, passing by, had told Ringen and another employee that he was on his way to the office. When Ringen asked who the Company was laying off, Jaconski

Former Warehouse Supervisor Wier testified that about 2 weeks after the election he and the other supervisors attended a meeting called by Waters, who told them that as of Friday of that week all the men would be laid off, and beginning with the following week the Respondent was going to use an outside agency to do all the warehouse work. Wier asked when he should inform the employees. Waters replied that Wier should tell the employees on Friday, when they were paid at the end of the week, and to give them a week's notice at that time. Waters explained that the layoffs were being effectuated because it was estimated that the Company could save $50,000 a year by going to an outside agency in that it would not have to pay employee benefits, pensions, and other related expenditures. Waters also stated that the Respondent did not want the threat of the Union hanging over its head because in all probability the employees would go union in another year from that time when a new election could be held. Waters told the group that the Respondent's president, Newhouse, would probably close the Edison terminal if the men did go union. The Company wanted to remain nonunion.

Both Murphy and Waters described a series of studies they, respectively, had made in May on the comparative costs of subcontracting the warehouse labor upon which the estimated savings were based.[32]

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answered that Murphy, the Respondent's vice president, had told him that the Company was taking care of him and owed him for what he had done for it.

[32] The record reveals that the Respondent's labor costs for its own employees had increased in that as of April 27 all warehouse employees received equalizing increases aligning them at uniform weekly pay levels, and the Respondent, since the election, for the first time was paying its employees time and a half in overtime pay after 8 hours per day. In addition, the Respondent also had recognized the employees' grievance committee and had obligated itself to process grievances. The Respondent's fringe benefit package for its own employees, however, was less

Murphy testified that the Respondent had followed a practice of subcontracting its work and that he, in fact, had first recommended subcontracting work in the Edison workhouse to the Respondent's Houston headquarters office in 1975. Later, in January 1977, because of the financial problems then extant, he requested authority to investigate subcontracting the warehouse work in order to reduce costs. He reasoned that subcontracting would give him control of the number of employees to work at a given time so that, based on fluctuating work volume, only those employees actually required would be used. This could provide substantial savings over the need to employ a fixed group as done with the Respondent's own employees.

Murphy testified that the Respondent's financial situation continued to worsen in that its contract with the customer air force underwent two changes in scope. The first major change occurred in June 1976 when the Respondent was required to interface with the customer air force's logistics system, which resulted in increased costs to the Respondent. The second major change occurred when the customer air force acquired a fleet of large air cargo carriers which it began to operate as a wing of its own air force. This reduced the number of charter flights for which the Respondent had been contracting, and thus the Respondent lost a previously earned 5-percent CAB commission on all such flights. In addition, the customer's newly acquired airlift capacity resulted in a reduction of ocean bookings costing the Respondent an additional decline in revenues generated through brokerage fees for these ocean voyages.

A final factor increasing the Respondent's costs at that time was the need to install a computer, which was done in May or June, to enable the Respondent to keep

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costly than it might appear, as before the May 6 layoff only four Edison employees had sufficient service to be eligible to participate in the profit-sharing and stock option plans.

current with the customer air force's requirements. The air force refused to renegotiate its contract to allow the Respondent to recover any part of these lost earnings or higher costs.

Based upon a financial reversal in December 1976, the above-described factors which served to further reduce the Respondent's earnings, and his economic analysis, Murphy again recommended to Newhouse that the warehouse work be subcontracted and that five warehouse employees be laid off with severance pay and vacation allowances.

On May 6 the first layoffs—of Ray Stromberg, Kitson, and Lanza—were accomplished. These, however, were not a part of the subcontracting decision,[33] but were based on Waters' statement to Murphy about 2 weeks earlier that he thought it was possible to reduce his warehouse work force by three. Murphy approved this action and the three employees were laid off.

Murphy testified that the June 3 layoffs of Colacino, Ippollito, Ringen, Sanders, and Eric Stromberg occurred pursuant to the decision to subcontract the work, which thereafter was done by employees of ESP, Inc., the contractor. The ESP personnel, in turn, thereafter were trained for their work by Lesniakowski and Jaconski,[34] who, as noted, had been assigned to work in quality control after the election under a new supervisor. They were the first assistants to be assigned to

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[33] The contract with ESP, Inc., the contractor who finally assumed the warehouse work, was not executed until May 26 and no costs were executed under it until June 6.

[34] Jaconski temporarily quit his job with the Respondent on May 6, against the urging of company officials, because he felt badly about the layoffs and sensed that other employees disliked him presumably because of his involvement in cosponsoring the March 31 employees' meeting. However, after later being asked to return by the Respondent, he went back to work on May 23.

that area, which previously had been handled by one man.

C. *Analysis and Concluding Findings*

1. The March 31 employees' meeting

The General Counsel, contrary to the Respondent, contends that, in conducting the meeting of the entire warehouse staff on March 31 in the absence of supervisors, Lesniakowski and Jaconski acted as agents of the Respondent and that their acts in connection with that meeting were binding on the Respondent. The Respondent denies that they acted as agents, indicating their general rank-and-file status.

To determine such agency, it is not necessary to find direct evidence that the activities of Lesniakowski and Jaconski actually were authorized or subsequently ratified. Rather, agency may be inferred from the circumstances.[35]

Summarizing the credited evidence in this area, Lesniakowski and Jaconski were the first employees allowed to call a meeting of other employees during working hours when no supervisor was present, receiving permission from Waters for the same in order to discuss "the union matter." Although the meeting occupied the great bulk of the workday of all the Edison Warehouse employees, all were paid for the time spent at the meeting and none were questioned or reprimanded with respect to their long absences from their work stations. The antiunion petition drafted and signed at that meeting was typed at Waters' insistence on company stationery and delivered to Waters. Later that day Lesniakowski and Jaconski also brought to

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[35] See *Razco, Inc., d/b/a Hit 'N Run Food Stores*, 231 NLRB 660, 669 (1977); *Dellridge Associates, Inc., d/b/a Dellridge Nursing Home*, 234 NLRB 595, 599 (1978); *Birmingham Publishing Company*, 118 NLRB 1380, 1381–82 (1957), enfd. 262 F.2d 2 (5th Cir. 1958).

Waters the employees' list of requested improvements and benefits prepared in the context of their having signed the request for withdrawal of the election petition. To some employees, these proposals represented a hoped-for exchange for the antiunion petition. The list included requests for overtime after 8 hours of work, paid hospitalization, equal pay for equal work, and establishment of a grievance procedure. The grievance committee members were elected on March 31 and were recognized and dealt with by management before the election. Subsequently, Waters pursued the remaining proposals with management and all but paid hospitalization were eventually granted.

In these circumstances, noting particularly that Waters had allowed the unprecedented meeting and had accepted the employees' signed request for withdrawal of the union petition and their list of requested job improvements which had evolved from the meeting, that he subsequently granted most of the employees' requests, and that it is inconceivable that the meeting could have lasted for as long as it did without disciplinary action by the Respondent unless conducted with the direction, assistance, and encouragement of management, I find that Lesniakowski and Jaconski acted as the Respondent's agents in conducting the March 31 meeting and that their statements to the warehouse employees and actions on that occasion were binding upon the Respondent. Therefore, it is concluded that the Respondent, through Lesniakowski and Jaconski, violated Section 8(a)(1) of the Act by threatening employees during the March 31 meeting that their work would be subcontracted or the warehouse would be closed if the election was conducted and the Union was voted in.[36]

[36] There is no evidence that Lesniakowski or Jaconski interrogated employees as to their union sympathies or desires on March 31. While it could be argued that, in impelling the employees to sign the request for withdrawal of the union petition,

2. The preelection diversion of freight

In concluding that the Respondent, in the preelection period, was utilizing and building upon a slow period in the warehouse to impress upon its employees the message of the March 31 meeting that work was slow and if they supported the Union their jobs would be in jeopardy, I note former Warehouse Supervisor Wier's testimony that in April, before the election, Waters, in directing him to divert incoming freight to the Summit warehouse, had told him that the Respondent wanted the employees to see an empty warehouse and let them think a little bit on the matter.

Although Wier, on cross-examination, continued to adhere to this testimony, the Respondent contends that Wier, who was subsequently severed by the Company, was a disgruntled witness whose testimony against the Respondent should not be credited. Wier testified that in the course of his employment he had received three disciplinary letters from the Respondent relating to his job performance, and that in September he was told by Hesse that she had learned from Waters that Wier would be laid off in 1 month. In connection with his layoff the Respondent offered to give Wier 1 month's severance pay and bear the cost of the forthcoming maternity hospitalization for Wier's wife if Wier signed a letter of resignation. If Wier refused to sign he would receive nothing. Although Wier did not sign the resignation letter, he did receive the severance pay and also was paid through October 7 although he actually ceased to work for the Respondent 2 weeks before that date. Still pending at the time of the hearing was Wier's hopes for hospitalization benefits as his child had not yet been born.

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the employees were obliged to go on record as to their stand on the Union at that time, this is a separate form of interference with their rights under Sec. 7 of the Act, to be considered below, and to find that this constituted interrogation would strain the customary usage of that term.

Although Wier was not pleased at his treatment by the Respondent, I find him to be a credible witness. His testimony is consistent with the general fact pattern of this case, which, as will be discussed below, shows a determined effort by the Respondent to defeat the Union by extreme tactics which are detailed in this Decision. While Wier may have lost his position by the time of the hearing, he had received at least 1 month's severance pay and still hoped to obtain hospital coverage from the Respondent for his wife's maternity period. Accordingly, as Wier's testimony adverse to the Respondent was inconsistent with his interest in receiving the hospitalization payment, his account of the events is afforded additional credence.

However, Wier's testimony as to the significance of the empty warehouse is corroborated by other factors indicated above. Although the dust accumulation in the warehouse which led to the floor sealing operation had been a problem for some time, it was decided to deal with it only in a preelection period. The warehouse staff, underutilized at the time, was not assigned to move the in-house inventory from the area to be sealed, but, rather, this work was assigned to the supervisors, who did this work after the regular work hours. Even accepting, *arguendo*, the Respondent's assertion that it was necessary in the preelection period to have leased the space from Summit to reduce the freight level in its own warehouse in preparation for the floor sealing, the record reveals that it would have been less costly for the Respondent to merely have leased the space at Summit and used its own employees to handle the diverted frieght on Summit's premises. Instead, the Respondent hired both space and labor from Summit while retaining its own employees. That the Respondent was free to have assigned its own employees to work at the Summit warehouse is clear from the fact that in this period it actually did assign Lesniakowski and two others to that location to work with the Summit crew. The Re-

spondent as part of its antiunion campaign, as particularly evidenced by the remarks of Lesniakowski at the March 31 meeting, specifically called attention to the lack of work in the warehouse and the threat of possible future layoffs as its means of inducing employees to give up the Union. That this was intended is corroborated by Wier. While the floor sealing operation may have abated the dust and solved a real problem for the Respondent, the way the matter was handled served to provide an atmosphere continually supportive of the March 31 threats of layoff or shutdown.

Although the use of the freight division before the election, at least in part, to make its employees apprehensive about supporting the Union was not alleged as a violation in the complaint, the matter was fully litigated at the hearing and is closely related to matters actually alleged. Accordingly, I find this conduct to be violative of Section 8(a)(1) of the Act.

3. The alleged unlawful promises and granting of wage increases and other benefits

The General Counsel, contrary to the Respondent, contends that various pay increases were granted unlawfully in the preelection period to discourage union support and activity by Respondent's employees.

From the credited evidence, including the Respondent's payroll records, it is concluded that on March 26 Michael Lanza and Clara Kitson and on March 28 Michael Jaconski, respectively, were unlawfully reclassified from receiving clerks to the higher paid position of warehousemen. In view of the timing of these raises after the start of the Union's organizational drive,[38] and the Respondent's other conduct found unlawful herein, noting also that it is established that the institution of a

[38] Wier's testimony that he informed the Respondent of the start of the Union's campaign upon learning of it from employees in the first week in March is credited.

new classification and wage scale in response to an organizational drive is unlawful,[39] I find, under the circumstances herein, that the reclassification of these three employees to higher paying positions is violative of Section 8(a)(1) of the Act. Waters' explanation that the reclassifications had occurred because the receiving clerk job was being eliminated as all warehouse employees were doing the same work illustrates the Respondent's timing as this situation apparently had been true for some time before.

Crediting the testimony of employee Ippolito, I conclude that Waters, at a preelection meeting of all warehouse employees in April, announced that he was trying to fight for equal pay for equal work and that $300 a week was a justifiable wage.[40] This raise was actually given but 2 days after the election at a time when objections to the election could still have been timely filed.

In my view, Waters' statement to the employees, as described by Ippolito, constituted a promise of a pay increase in the stated amount, and apparently was a preelection response to the list of employee proposals sent to him by them on March 31 in consideration of their having signed the petition withdrawing their support for the Union. Contrary to Waters' testimony that increased wages and other benefits were not requested until 2 days after the election when the request was processed, the Respondent's own records, as noted, show that the across-the-[b]oard increment became effective 2 days after the election. Accordingly, I find that the Respondent had announced and undertaken to obtain the pay raise well before the election was conducted in violation of Section 8(a)(1) of the Act.

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[39] *Frymaster Corporation*, 233 NLRB 619 (1977).

[40] At that time, the most highly paid warehouse employees earned a weekly raise of $289.

The only other job benefit granted by the Respondent in the preelection period was the establishment and recognition of the three-member grievance committee formed at the March 31 meeting and as a result thereof. Although this committee took its inception from the employees' request for such representation, the committee received its validity and standing from the Respondent as part of the consideration for the employee-signed petition requesting withdrawal of the representation election petition. In that sense, the grievance committee was an unlawful job benefit given before the election to encourage the employees to abandon their support for the Union and to seek redress of their job-related problems and grievances through the alternative thus provided. Accordingly, it is concluded that, in recognizing the grievance committee under the circumstances herein, the Respondent violated Section 8(a)(1) of the Act.

4. The alleged unlawful threat of loss of job benefits

In accepting the testimony of employee Edmund Ringen that, at a preelection meeting of all warehouse employees in April, Waters declared that if the employees did vote for the Union he probably would handle negotiations and that there was a good chance that they would then lose their stock option plan, profit-sharing plan, and pension benefits, Waters' denial of the same is not credited as, for reasons set forth above, he is not deemed a reliable witness.

The Respondent contends that, even if Waters had made the remarks attributed to him by Ringen in threatening the loss of job benefits, such comments were recognized as insubstantial by Ringen himself, as Ringen, in response, has asked, in effect, how could these benefits be lost as the employees had vested rights. However, this argument lacks merit. Ringen's statement was in the nature of a protest which did not reduce the significance of the threat. It did not even de-

scribe the relevant situation, as only 4 of the approximately 14 employees who heard Waters that day had vested rights to these benefits. Accordingly, it is concluded that, in threatening the loss of such benefits, the Respondent violated Section 8(a)(1) of the Act.

5. The alleged unlawful interrogation

From the uncontradicted testimony of Joseph Sanders, it also is found that about 3 days before the election, at a bar, Warehouse Supervisor Houlihan, in violation of Section 8(a)(1) of the Act, had asked Sanders, in effect, why the employees wanted a union, how he and each of the other employees would vote in the forthcoming election, and who had started the Union.

Two other incidents involving Houlihan, referred to above and not specifically alleged in the complaint, also are worthy of note. First, Lesniakowski testified, also without contradiction, that about 3 days before the March 31 meeting, while but two bar stools away, he overheard Houlihan tell an acquaintance that the work was being diverted to the Summit warehouse and that it looked as though the Company was going to subcontract out the work if the Union came in. Lesniakowski gave this incident as a motivating factor in his decision to seek the March 31 meeting. The second undisputed occurrence is taken from Eric Stromberg's testimony that on the night of June 3 immediately following his layoff, while Stromberg also was in a bar with Houlihan, the latter told him that the layoffs and the whole union thing were all Stromberg's fault, repeating this with increasing belligerence. Houlihan's conduct relating to Stromberg and Lesniakowski was sufficient to constitute unlawful coercive interference with the rights of the affected employees. However, in view of my other conclusions in this matter, which include extensive violations of Section 8(a)(1) of the Act, no unfair labor practice finding will be made with respect to the incidents relating to Lesniakowski and Stromberg as

these events were not alleged in the complaint and, if found, would not materially affect the remedy found herein.

6. The alleged unlawful layoffs

In agreement with the General Counsel, the economic defense offered in justification of the layoffs on May 6 and June 3, respectively, of eight employees must be considered in the context of the union animus shown by the Respondent. At the March 31 meeting employees were told that if the Union came in or an election were conducted their work would be subcontracted or the warehouse would be closed and thus were persuaded to sign a written request for withdrawal of their representation petition. In the critical period before the election the Respondent also gave and promised to give pay increases, recognized an employee grievance committee, and conducted meetings of employees where, at various times, they were told by members of management that if they did not organize business prospects looked good, and if the employees became unionized there was a good chance that they would lose their profit-sharing plan, stock option plan, and pension benefits. To create a sense of anxiety among its employees during the preelection period, the Respondent magnified a slow period in the warehouse by diverting incoming freight to a contractor's premises where it was handled by that employer's crew, and used its own supervisors after hours to move inventory away from the floor area to be sealed, although the Respondent's own employees were underutilized at the time. As Wier credibly testified, a purpose of the strategem was to let the employees see an empty warehouse and think about the union matter. After the last layoffs occurred, on June 3, Houlihan told Eric Stromberg, the principal employee union activist, that the layoffs and the Union had been Stromberg's fault.[41]

[41] As noted, Houlihan also, at various times after the repre-

[Continued next page—]

While subcontracting had been considered by the Respondent for years and some contractor labor had been utilized during the first 6 months of the warehouse's operation, no subcontracting was again done until the Union began to organize the Respondent's employees.

Although the General Counsel argues with regard to Waters' study that, adjusting for the salaries and fringe benefits of employees Lesniakowski, Jaconski, and Tiedemann, who was omitted therefrom, the cost to the Respondent of operating the warehouse with ESP labor for the 4-week period between the weeks ending June 4 to June 25 was nearly $3,000 more than it had cost to run the operation with its own employees between the 4 weeks ending April 15 and May 6, this would not necessarily be a valid projection for future comparative costs. Most of the benefits considered herein, including the across-the-board pay raise and liberalized overtime pay policy, became effective only on or after April 27, and were not factors during most of the earlier 4-week period referred to by the General Counsel. As the Respondent, in subcontracting, could reduce or expand the work force according to need with greater flexibility, would be spared the processing of employee grievances and payment of fringe benefits, and could keep fewer records, I am prepared to accept the Respondent's position that subcontracting the warehouse labor ultimately could be financially beneficial.

However, noting that the layoffs began on May 6, only about 1½ weeks after the effective date of the across-the-board pay increase of April 27 and soon after other benefits such as the grievance committee and increased overtime benefits were granted, and Wier's

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[Footnote continued—]
sentation petition was filed, deliberately stated in Lesniakowski's hearing that the work was being diverted to Summit and that it looked as though the Respondent would subcontract out the work if the Union came in, and unlawfully interrogated Sanders as to how he and the other employees would vote in the election and who had started the Union.

testimony that Waters, in directing the start of the layoffs, had told him and the other supervisors of the Respondent's continuing concern that the Union would try for another election in the following year when one could again be conducted, in the context of Newhouse's words of praise for the work of the Edison staff, it is concluded that, although the Respondent eventually could have reduced its costs by laying off most of its own warehouse employees and by subcontracting their work to ESP, the Respondent was motivated, at least in part, in so doing at that time by a desire to reduce the possibility of another union election in the future.[42] Accordingly, I find that the employee layoffs on May 6 and June 3, respectively, were in violation of Section 8(a)(3) and (1) of the act.[43]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

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[42] The treatment of the laid-off employees contrasts markedly with that afforded Lesniakowski and Jaconski, who were kept on at the new higher pay rate in apparent reward for their services to the Respondent in having conducted the March 31 meeting. In fact, when Jaconski left the Respondent's employ after the first layoffs, he returned only after having been invited back by the Respondent.

[43] Also considered in reaching the conclusion herein is the fact that the Respondent, through Houlihan's interrogation of Sanders, had actual knowledge that laid-off employees Eric and Ray Stromberg were principal union activists.

CONCLUSIONS OF LAW

1. Behring International, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) of the Act by permanently laying off or terminating Ray Stromberg, Eric Stromberg, Clara Kitson, Michael Lanza, Eugene Colacino, Anthony Ippolito, Edmund Ringen, and Joseph Sanders because of their support for and activities on behalf of the Union.

4. The Respondent violated Section 8(a)(1) of the Act by all of the foregoing conduct and by coercively interrogating an employee concerning his union sentiments, those of other employees, and as to the identity of the employees who instigated the Union; promising and granting employees a pay raise and improved employment benefits to discourage them from supporting the Union; threatening employees that their work would be subcontracted or the warehouse would be closed if an election were conducted and the Union were voted in; threatening employees with loss of benefits if the Union were voted in; soliciting employees to sign a request that the petition for a representation election be withdrawn; coercively telling employees that they would be better off without a union; and deliberately reducing the available amount of work in the warehouse in the preelection period by diverting freight and using contract labor in order to make employees apprehensive about supporting the Union.

5. The General Counsel has failed to prove by a preponderance of the evidence its contention that on March 31, 1977, the Respondent, through Robert Lesniakow-

ski and Michael Jaconski, its agents, unlawfully interrogated employees.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent be ordered to cease and desist therefrom and that it take certain affirmative action which is necessary to effectuate the policies of the Act.

In view of the finding that the Respondent unlawfully laid off or terminated Ray Stromberg, Clara Kitson, and Michael Lanza on May 6, 1977, and Eugene Colacino, Anthony Ippolito, Edmund Ringen, Eric Stromberg, and Joseph Sanders on June 3, 1977, and that the Respondent had failed and refused to reinstate them, it will be recommended that the Respondent be ordered to offer each of them immediate and full reinstatement to his or her former job or, if it no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and to make each of them whole for any loss of earnings that they may have suffered from the time of their termination to the date of the Respondent's offer of reinstatement, with backpay and interest computed in accordance with the Board's established standards as set forth in *F.W. Woolworth Company*[44] and *Florida Steel Corporation*.[45] As the Respondent's conduct found unlawful herein goes "to the very heart of the Act," a broad remedy is warranted.[46]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section

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[44] 90 NLRB 289 (1950).

[45] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[46] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

10(c) of the Act, I hereby issue the following recommended:

ORDER[47]

The Respondent, Behring International, Inc., Edison, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) coercively interrogating employees concerning their union activities, sympathies, and desires, those of other employees, and as to the indentities of employees active in bringing about the Union's organizational campaign.

(b) Threatening employees that if the Union comes in or a representation election is conducted their work will be subcontracted or that the plant will be closed.

(c) Threatening employees with loss of benefits if they support the Union.

(d) Promising and granting employees a wage increase and other employment benefits to induce employees to abandon their support for the Union.

(e) Soliciting employees to request, in writing, withdrawal of the petition for a representation election.

(f) Deliberately reducing the work available to its employees in the period before a representation election by diverting freight and using contract labor to discourage employees from supporting the Union.

(g) Coercively informing employees that they would be better off without the Union.

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[47] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(h) Discharging or laying off and refusing to reinstate or recall its employees in order to discourage its employees from becoming or remaining union members or otherwise supporting the Union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Ray Stromberg, Clara Kitson, Michael Lanza, Eugene Colacino, Anthony Ippolito, Edmund Ringen, Eric Stromberg, and Joseph Sanders immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, with interest thereon, to be computed according to the formula described above in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Edison, New Jersey, location copies of the attached notice marked "Appendix."[48] Copies of said notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be

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[48] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint found to be without merit are hereby dismissed.

NO. 82-438

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEHRING INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT, BEHRING INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Question Presented

Whether the United States Court of Appeals for the Third Circuit correctly concluded that the National Labor Relations Board had failed to establish that layoffs by Behring International, Inc. violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) (1976) because the National Labor Relations Board, after merely introducing evidence sufficient to raise an inference that antiunion animus was a motivating factor for the discharges, improperly shifted to Behring the ultimate burden of persuasion to establish the real cause of the discharges.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT:	
1. The language of the National Labor Relations Act is clear on its face and the issue presented herein has been resolved in a closely analogous context by the Court's recent decision in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)	6
2. The Third Circuit's Decision does not conflict with this Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)	14
CONCLUSION	17

PAGE

Table of Authorities

Cases Cited

Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) 15

Behring International, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982) 8, 15

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 10

Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (5th Cir. 1979), reversed, 450 U.S. 248 (1981) 9-11

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 9, 10, 13

Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667 (1961) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10

Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 12, 14-16

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 7

NLRB v. Wright Line, a Division of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 50 U.S.L.W. 3695 (3/2/82) 8

Speas v. Merchants' Bank & Trust Co., 188 N.C. 524, 125 S.E. 398 (1924) 14

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 6, 7, 11

Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 50 U.S.L.W. 3695 (3/2/82) .. 5, 11-13

PAGE

United States Constitution Cited

U.S. Const., Amend. 1 14
U.S. Const., Amend. 14 15

Statutes Cited

Administrative Procedure Act:
5 U.S.C. §556(d) 7

Civil Rights Act of 1964:
42 U.S.C. §2000(e), et seq. 6, 9

National Labor Relations Act, 29 U.S.C. §151 et seq.:
Section 8(a)(1), 29 U.S.C. §158(a)(1) 5
Section 8(a)(3), 29 U.S.C. §158(a)(3) ....i, 2, 6, 12, 13
Section 10(b), 29 U.S.C. §160(b) 14
Section 10(c), 29 U.S.C. §160(c) 6-8, 15

Regulation Cited

29 C.F.R. §101.10(b) 7

Rule Cited

Fed. R. Evid. 301 14

Other Authority Cited

9 Wigmore on Evidence, Section 2487 (3d ed. 1940) 14

NO. 82-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEHRING INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, BEHRING INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

The events underlying this action occurred in the spring of 1977 at a warehouse in Edison, New Jersey (hereinafter "the warehouse") which was owned and operated by respondent Behring International, Inc. (hereinafter "Behring").

Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 478") began an organizational campaign at the Behring warehouse on March 13, 1977. (Appendix to Petition by the National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, p. 2a. (hereinafter cited as "——a.")). A petition for a consent election was filed on behalf of Local 478 on March 22, 1977 and the election was held on April 25, 1977 (2a, 31a). A majority of the warehouse employees voted against the Union and no objections to the election or the conduct of the campaign were filed (2a). Thereafter, three warehouse employees were laid off on May 6, 1977 because the warehouse was overstaffed at that point in time (2a, 52a).

On May 26, 1977 Behring executed a contract to subcontract the warehouse work to an independent, outside contractor known as ESP, Inc. (2a, 52a). Five of the remaining warehouse employees were laid off on June 3, 1977 as a result of Behring's decision to subcontract for replacement labor with an outside firm (2a, 52a). The Administrative Law Judge (hereinafter "the A.L.J.") found, and the National Labor Relations Board (hereinafter "the Board") agreed, that the layoffs of May 6 and June 3, 1977 violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) (1976) (hereinafter "§8(a)(3)") because they were discriminatorily motivated (4a).

The historical context of the allegedly discriminatory layoffs of May 6 and June 3, 1977 amply rebuts any inference that the layoffs were discriminatorily motivated and fully supports the contrary inference that they were motivated by legitimate business reasons. Behring entered into

a contract with the Imperial Iranian Air Force (hereinafter "the I.I.A.F.") on August 11, 1975 to provide freight forwarding services to the I.I.A.F. purchasing mission in the United States (30a). Behring established the warehouse in November, 1975, pursuant to a freight forwarding contract with the I.I.A.F., to store and process for shipment to Iran material purchased for the I.I.A.F. (30a). The layoffs here at issue and the decision of Behring to subcontract the warehouse labor were directly caused by adverse business developments during the period beginning June, 1976 and continuing through June, 1977.

In June, 1976 a change in I.I.A.F. operations required Behring to interface with the I.I.A.F. logistics system (51a). This compelled Behring to incur increased administrative costs and to log significantly more computer time, without receiving any increased revenue from the I.I.A.F. (51a). In December, 1976 the I.I.A.F. acquired a fleet of cargo carriers (51a). This resulted in a substantial reduction in Civil Aeronautics Board commissions that Behring had been earning on charter flights, reduction of ocean bookings and reduction of brokerage fees for ocean bookings (51a). The net effect of these changes was a 30% to 70% reduction in the volume of activity at the Edison warehouse.

These developments led George Murphy, the warehouse manager, to recommend to Alan Newhouse, the President of Behring, that a study of savings to be realized by subcontracting the work be initiated and that the warehouse labor be subcontracted if the results of the study so indicated (51a). This is documented by a cable that Mr. Murphy sent to Mr. Newhouse on January 27, 1977 (51a), fully two months before the election petition was filed, and at a time when there was no organizational activity among the warehouse employees.

The substantially reduced volume of activity at and level of revenues flowing from the warehouse persisted through the time of subcontracting, in June, 1977 (51a-52a). Thus, the record below indicates that in March, 1977 there were no more than five or six hours work per day for the warehouse employees. The remaining hours of the day were filled with cleanup work and playing ping-pong, for which warehouse personnel were also paid. (Joint Appendix filed on behalf of Behring International, Inc., on review from the National Labor Relations Board, No. 81-1937, at page 550, line 12 through page 552, line 5. (hereinafter cited as "JA——:——")). This state of affairs served to dramatically highlight the need to do something to reduce labor costs at the warehouse.

In May, 1977, the study of labor cost savings realizable through subcontracting the warehouse work was completed and forwarded to Mr. Alan Newhouse (50a). The study indicated that Behring could realize labor savings of $137,000 per year if the warehouse work was subcontracted out (JA627:12). The A.L.J. specifically recognized that subcontracting the warehouse labor "could be financially beneficial" and that Behring "could have reduced its costs by laying off most of its own warehouse employees and subcontracting their work" (62a-63a). Accordingly, on May 26, 1977 Behring entered into a contract with ESP, Inc., an independent subcontractor, to subcontract the warehouse work (2a). The five layoffs occurred one week thereafter, upon the recommendation George Murphy, warehouse manager, to Mr. Newhouse (52a).

Both the A.L.J. and the Board agreed that the General Counsel had made a *prima facie* evidentiary showing sufficient to permit the inference that antiunion sentiment had been a motivating factor in the decision to lay off

the warehouse employees (24a-25a).* The record below demonstrates with absolute clarity that at all times Behring has steadfastly denied that antiunion sentiment caused the discharges.

Behring met the Board's *prima facie* case by producing substantial evidence that the decision to lay off the warehouse employees and to subcontract the warehouse labor had been contemplated by Behring well before the advent of the representation campaign, in response to a continuous decline in revenues and activity at the warehouse over the course of the preceding year (51a-52a). Thus, the initial permissive inference of discriminatory motivation arising from the General Counsel's *prima facie* case was at the very least neutralized by the contrary inference of non-discriminatory business justification arising from Behring's proofs (14a-15a).

Conceding that the option of subcontracting had been studied by Behring for years and that the decision to subcontract was economically justified, the A.L.J. ruled that the layoffs and discharges nonetheless violated §8(a)(3) because they were "in part" motivated by Behring's alleged antiunion animus (62a-63a). By contrast, the Board held that Behring had *failed* to establish a legitimate business reason for the layoffs and discharges. Relying upon its recent decision in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (March 2, 1982), the Board held that Behring had

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* This *prima facie* showing consisted of evidence of violations of Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) (1976), in the course of a representation election campaign and the fact that the two employees allegedly opposing the union had been retained in a supervisory capacity after other warehouse employees had been discharged (24a-25a; 61a-63a).

not met *the burden of persuasion* to substantiate its economic defense by a preponderance of the evidence because Behring could "point to no contemporaneous event which might have motivated the layoffs at that time." (25a).

REASONS FOR DENYING THE WRIT

I. The language of the National Labor Relations Act is clear on its face and the issue presented herein has been resolved in a closely analogous context by the Court's recent decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

Behring concedes that a conflict exists between the various circuit courts of appeal regarding the proper allocation of the burdens of persuasion and of producing evidence as to the employer's true motivation in cases of allegedly unlawful employee discharges in violation of §8(a)(3). Nevertheless, the Court should not grant the writ because the plain language of the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1976) (hereinafter "The Act"), explicitly places the burden of persuasion on the Board to establish the existence of unfair labor practices by a preponderance of the evidence. 29 U.S.C. §160(c)(1976). Furthermore, this precise issue has already been resolved by this Court in the closely analogous context of alleged discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.* *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

In *Burdine*, this Court clearly held: (1) that *the burden of persuasion* to establish that discrimination motivated a discharge rests with the complaining party at all times;

and (2) that after the plaintiff establishes a *prima facie* case, creating a permissive inference that a discharge was motivated by discrimination, the employer has *the burden of producing evidence* of a legitimate reason for the discharge. 450 U.S. at 254, 259-260. This identical allocation of the burdens of persuasion and of producing evidence is required by the express language of the Act, and is consistent with the legislative history of the Act. *See* 29 U.S.C. §160(c) (1976) (hereinafter "§10(c)").

The Act plainly places the burden of persuasion upon the General Counsel to establish that a violation of §8(a)(3) has occurred. In this regard §10(c) provides in pertinent part as follows:

> If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . .

29 U.S.C. §160(c)(1976) (emphasis added).* The Board's own regulations state that "[t]he Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act." 29 C.F.R. §101.10(b) (1981). Furthermore, Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d) (1976), provides in pertinent part that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

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* It should be noted that §10(c) of the Act clearly preserves management's historical prerogative to discipline and discharge employees "for cause." 29 U.S.C. §160(c) (1976). *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937) (Act does not interfere with normal exercise of managerial discretion with respect to hiring and firing).

In light of this clear and compelling statutory command it is entirely inappropriate to resort to the legislative history of the Act. The United States Courts of Appeal for the First and Third Circuits have found that the language of the Act is clear in this regard and that the legislative history is inconclusive at best. *See Behring International, Inc.* v. *NLRB,* 675 F.2d 83, 88 n.5 (3d Cir. 1982); *NLRB* v. *Wright Line, A Division of Wright Line, Inc.,* 662 F.2d 899, 904 n.8 (1st. Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 2, 1982). The Board's strained reading of highly selective quotations from the legislative history of one sentence of §10(c) that does not even address allocation of burdens of proof is not convincing.* Indeed, the legislative history the Board quotes demonstrates that the speakers were not aware of the critical distinction between the burden of persuasion and the less onerous burden of producing evidence.

Where, as here, an employer asserts that it discharged employees for legitimate business reasons and not for the purpose of discouraging union activity, the Board must determine "the 'true purpose' or 'real motive' in hiring or firing." *Local 357, International Brotherhood of Teamsters* v. *NLRB,* 365 U.S. 667, 675 (1961). The Board must determine whether the employer's alleged antiunion sentiment or the proffered business reason was the *cause in fact* of the discharge. If the Board finds that the discharge violated §8(a)(3) because antiunion sentiment, rather than a legitimate business reason, was the "true cause", the Act requires that this finding must be supported by the preponderance of the evidence. *See* 29 U.S.C. §160(c), *supra.*

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* The sentence of §10(c) on which the Board's legislative history argument rests concerns limitations on the Board's power to order reinstatement and back pay for individuals discharged for cause.

This Court has confronted the problem of allocating the burdens of persuasion and of producing evidence in the context of cases alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.* The line of cases culminating in *Burdine, supra,* has developed the correct method of ascertaining whether a defendant employer's actions were discriminatorily motivated or were caused by legitimate, nondiscriminatory reasons:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, supra, 450 U.S. at 252-253. (citations omitted).

In *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), this Court cogently explained the nature and effect of a *prima facie* showing of discrimination with respect to employment:

> *A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination,* however. Rather, it is simply proof of actions taken by the employer from which we *infer* discriminatory animus because experience has proved that *in the absence of any other explanation* it is more likely than not that those actions were bottomed on impermissible considerations.

Id. at 579-580 (emphasis added). Referring to the employer's burden "to *articulate* some legitimate, non-discriminatory reason for the [employer's actions]", *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (emphasis added), this Court has held that:

> We think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." . . . the former will suffice to meet the employee's *prima facie* case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for reconsideration in the light of *Furnco* . . . We quite agree with the dissent that under *Furnco* and *McDonnell Douglas* the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons."

Board of Trustees of Keene State College v. *Sweeney*, 439 U.S. 24, 25 n.2 and accompanying text (1978) (citations omitted).

In *Burdine, supra,* the Court of Appeals ruled that the employer had not rebutted the plaintiff's *prima facie* case of discrimination because it had failed "to prove nondiscriminatory reasons *by a preponderance of the evidence.*" *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979) (citation omitted) (emphasis added). The Court of Appeals was reversed precisely because it had improperly placed the *burden of persuasion* on the employer to establish a legitimate, nondiscriminatory reason by a preponderance of the evidence. In so holding, this Court stated:

> The burden that shifts to the defendant, therefore, is *to rebut* the presumption of discrimination *by producing evidence* that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *The defendant need not persuade the court that it was actually motivated by the proferred reasons.*
>
> . . .
>
> [T]he Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the respondent . . . When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.

Burdine, supra, 450 U.S. at 254, 259-260 (emphasis added) (citations omitted).

In *Wright Line, A Division of Wright Line, Inc.,* 251 N.L.R.B. 1083 (1981), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 2, 1982), the Board articulated the rule that it would apply henceforth in resolving cases which present competing explanations for an employer's decision to discharge employees.* *Wright*

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* In *Wright Line, supra,* the Board articulated the following test (hereinafter "the *Wright Line* test") for determining the true case of discharge in so-called "dual motivation" cases:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

251 N.L.R.B. at 1089.

Line employed a "but for" test of causation analysis. Dispensing with analytical models previously employed, the *Wright Line* test essentially states that a violation of §8(a)(3) is proven when it is shown that the employer would not have discharged its employees but for their union activity. The Board purportedly derived this test from the opinion of the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1974).

Upon closer analysis, it becomes apparent that, in derogation of the express requirements of the Act, the effect of the *Wright Line* test is to enable the Board to find that an employer has violated §8(a)(3) *without* requiring the Board to demonstrate by a preponderance of the evidence that the employee would not have been fired but for his protected activity. Instead, once the General Counsel has produced sufficient evidence to permit an inference that the employer's alleged antiunion sentiment was a motivating factor in the decision to discharge, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line, supra*, 251 N.L.R.B. at 1089. It is not enough for the employer to meet the permissive inference of discriminatory intent by producing evidence sufficient to permit a contrary inference that the employee was discharged for legitimate, non-discriminatory reasons. The *Wright Line* test clearly places upon the employer the risk of non-persuasion (i.e., burden of persuasion) to show by a preponderance of the evidence that the discharge would have occurred even if the employee had not engaged in protected activity.

The *Wright Line* test, as applied by the Board, allows the Board, upon establishing nothing more than a permissible inference, to conclude that antiunion animus was

the "true cause" of discharge in each case where the employer fails to prove by a preponderance of the evidence that the employee was discharged for legitimate business reasons. This test reverses the allocation of the burden of proof required by express statutory language: it requires the *employer* to prove by a preponderance of the evidence that its actions were *not* motivated by antiunion sentiment. This is precisely what happened to Behring in the instant case. Behring produced unrefuted and credited evidence which was obviously sufficient to support the inference that the decision to subcontract and to reduce the warehouse labor force was economically justified. At the very least Behring's evidence was sufficient to neutralize entirely the inference created by the Board's *prima facie* case.

The A.L.J. specifically found that subcontracting would be economically advantageous (62a). Notwithstanding this finding the A.L.J. found that the discharges and subcontracting violated §8(a)(3) because they were motivated "in part" by animus (63a). Significantly, the Board, applying its *Wright Line* analysis, ruled that Behring *failed* to establish the economic justification because it could point to no contemporaneous event to justify the timing of the layoffs and the decision to subcontract (25a).

It cannot be overemphasized that the General Counsel only established a *prima facie* case, *i.e.*, a showing sufficient to permit an *inference* as to the ultimate issue of whether the true cause for the discharge was antiunion animus. This is *not* equivalent to a factual finding of discriminatory intent. *See Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 579-580. The General Counsel had not conclusively established that Behring discharged the warehouse employees *because of* antiunion animus. Yet the burden the Board placed on Behring plainly and im-

properly exceeded the burden of rebutting the *prima facie* case.*

II. The Third Circuit's decision does not conflict with this Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

The Board's assertion that the writ should be granted because the Third Circuit's decision is somehow at odds with this Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), is without merit. *Mount Healthy* is plainly inapposite to the instant matter.

First, *Mount Healthy* involved the discharge of a school teacher in violation of the First Amendment, U.S. Const.,

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* As Professor Wigmore has stated:

> "[A] 'prima facie' case . . . need not be overcome by a preponderance of the evidence or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof. . . ."

9 Wigmore on Evidence §2487, at 282 (3d ed. 1940) (quoting *Speas* v. *Merchants' Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924)).

Further, the Federal Rules of Evidence, which the Taft-Hartley amendments to the Act make applicable to unfair labor practice proceedings before the Board, 29 U.S.C. §160(b), clearly distinguish between the burden of persuasion and the burden of rebutting presumptions arising from a *prima facie* case, and state that the burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301.

Amend. 1, and did not involve the provisions of the National Labor Relations Act. As a result, in *Mount Healthy*, this Court was free to allocate the respective burdens of proof without regard to statutory restrictions. However, in the present case, the Board is bound by the explicit statutory restrictions of the Act, 29 U.S.C. §160(c), and is precluded from shifting the burden of persuasion to an employer. *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 88 (3d Cir. 1982).

Second, the Court in *Mount Healthy* did not address the allocation and shifting of evidentiary burdens with respect to inferences as to the true motivation for discharge. In *Mount Healthy* the improper motivation was directly and concretely established by the written admission of the employer. The apparent evidentiary burden placed on the employer in that case was to establish an affirmative defense and was, therefore, one of persuasion on that issue.*

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* *Arlington Heights* v. *Metro. Housing Corp.*, 429 U.S. 252 (1977) does not alter this analysis in the least. In that case, plaintiffs sought to establish a violation of the Equal Protection Clause, U.S. Const., Amend. 14, by demonstrating the racially discriminatory impact of a decision by the defendant Village's zoning board. The Supreme Court reversed the Court of Appeals' grant of relief, holding that discriminatory impact, without a finding of discriminatory intent, was not sufficient to establish a violation of the Equal Protection Clause. 429 U.S. at 270. The Court discussed, in *dicta*, indicia of discriminatory intent, but did not differentiate between the effect of an inference of discriminatory intent arising from a *prima facie* showing and the effect of a *factual finding* of discriminatory intent. Indeed, the opinion strongly suggests that a *prima facie* showing of discriminatory intent had not been made. *Id.* at 268, 269, 270 n. 21. The language contained in the opinion to the effect that the defendant has "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered" was *dicta*. *Id.* at 270 n. 21.

Unlike the *Mount Healthy* case, in the present case, the only burden that could be properly placed upon Behring was to come forward with evidence to rebut or neutralize an inference of improper motivation. Behring clearly met this burden.

CONCLUSION

For all the foregoing reasons, the petition to the National Labor Relations Board for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied. In addition, the request of the National Labor Relations Board to have the petition for a writ of certiorari in this case held and disposed of in light of the disposition of No. 82-168, *NLRB* v. *Transportation Management Corp.* should be denied.

In the alternative, if the Court decides to grant the writ of certiorari in *Transportation Management* and to hold and dispose of the writ in this case in light of the disposition of *Transportation Management,* Behring respectfully requests the Court to consolidate the two matters and afford Behring a full opportunity to brief and argue the questions presented on the merits.

Respectfully submitted,

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